E COPY

FILED
AUG 3 1953
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 229

ROLAND C. HAINES, ET AL., COMPRISING KEYSTONE POLICYHOLDERS' COMMITTEE,

Appellants,

vs.

COMMONWEALTH OF PENNSYLVANIA, ET AL.

APPEAL FROM THE SUPREME COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

STATEMENT AS TO JURISDICTION

ELLIS G. ARNALL,
CLEBURNE E. GREGORY, JR.,
Room 631, The First National Bank Building,
Atlanta, Georgia,

WALTER M. NEWMAN,
Room 1100, The Jones Law Building,
Pittsburgh, Pennsylvania,
Counsel for Appellants.

ARNALL, GOLDEN AND GREGORY,
WALKER AND NEWMAN,
Of Counsel.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statutory provision believed to sustain jurisdiction	1
The Statutes of Pennsylvania, the validity of which are involved	2
Date of judgment and of application for appeal	4
Statement showing jurisdiction	4
Authorities believed to sustain jurisdiction	10
Authorities showing that the questions are substantial	11
Time and method of raising the federal question	22
Appendix "A"—Opinion of the Supreme Court for the Middle District of Pennsylvania, dated December 8th, 1952	25
Appendix "B"—Opinion of the Supreme Court for the Middle District of Pennsylvania, dated November 22nd, 1950	42
Appendix "C"—Full text of Pennsylvania statutes the validity of which is drawn in question	47

Table of Cases Cited

Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine, et al. v. *Michaux*, 279 U.S. 737, 49 S. Ct. 483, 73 L. ed. 931	19
Armour Transportation Company v. *Pennsylvania Public Utility Commission*, 138 Pa. Super. 243	15
Baker's Appeal, 109 Pa. 461	21
Bedford Railroad Company v. *Bowser*, 48 Pa. 29	21
Chidsey, Commissioner ex rel. v. *Keystone Mutual Casualty Company*, 366 Pa. 149	21
City of New York v. *New York, New Haven and Hartford Railroad Company*, 344 U.S. 293, 97 L. ed. (Advance p. 268)	14
Claghorn, Commissioner ex rel. v. *Cullen, et al.*, 13 Pa. St. 133	16
Coe v. *Armour Fertilizer Works*, 237 U.S. 413, 35 S. Ct. 625, 59 L. ed. 1027	14
Cole v. *Arkansas*, 333 U.S. 196, 68 S. Ct. 514, 92 L. ed. 644	13

BLEED. THROUGH POOR COPY

Page

Commissioner ex rel. Chidsey v. *Keystone Mutual Casualty Company*, 366 Pa. 149 21
Commissioner ex rel. Claghorn v. *Cullen, et al.*, 13 Pa. St. 133 16
Commissioner v. *First National Bank of Easton*, 303 Pa. 241 16
Commonwealth v. *O'Keefe*, 298 Pa. 169 15
Commonwealth v. *O'Leary*, 168 Pa. Super. 569, 79 A. (2d) 789 5
Cooke v. *United States*, 267 U.S. 517, 45 S. Ct. 390, 69 L. ed. 767 14
Dahnke-Walker Milling Company v. *Bondurant*, 257 U.S. 282, 42 S. Ct. 10, 66 L. ed. 239 11
Darling v. *Newport News*, 249 U.S. 540, 39 S. Ct. 371, 63 L. ed. 759 11
DeLucca's Liquor License Case, 124 Pa. Super. 500 12
Fiske v. *Kansas*, 274 U.S. 380, 47 S. Ct. 655, 71 L. ed. 1108 11
General Oil Company v. *Crain*, 209 U.S. 211, 52 L. ed. 754 4
Grannis v. *Ordeau*, 234 U.S. 385, 34 S. Ct. 779, 58 L. ed. 1363 12
Griffin v. *Griffin*, 327 U.S. 220, 66 S. Ct. 556, 90 L. ed. 635 19
Hovey v. *Elliott*, 167 U.S. 409, 17 S. Ct. 841, 42 L. ed. 215 15
Hughes v. *Hughes*, 306 Pa. 75 19
In Re William Oliver, 333 U.S. 257, 68 S. Ct. 499, 92 L. ed. 682 13
Interstate Commerce Commission v. *Louisville and Nashville Railroad Company*, 227 U.S. 88, 33 S. Ct. 185, 57 L. ed. 431 18
Lancaster and Mintzers Appeal, 111 Pa. 524 19
Magwire v. *Tyler*, 75 U.S. (8 Wall.) 650, 19 L. ed. 320 19
Manlin v. *Tener*, 146 Pa. Super. 598 19
Morgan v. *United States*, 304 U.S. 1, 58 S. Ct. 773, 82 L. ed. 1129 12
Mullane v. *Central Hanover Bank and Trust Company*, 339 U.S. 306, 70 S. Ct. 652, 94 L. ed. 865 11

Page

Myles Salt Company v. *Board of Commissioners of the Iberia and Saint Mary Drainage District*, 239 U.S. 478, 36 S. Ct. 204, 60 L. ed. 392 11

National Auto Corporation v. *Barford*, 289 Pa. 307 18

Ohio Bell Telephone Company v. *Public Utilities Commission of Ohio*, 301 U.S. 292, 57 S. Ct. 724, 81 L. ed. 1093 16

Oliver, In Re William, 333 U.S. 257, 68 S. Ct. 499, 92 L. ed. 682 13

Palko v. *Connecticut*, 294 U.S. 70, 58 S. Ct. 149, 82 L. ed. 288 17

Railroad Commission of Colorado v. *Pacific Gas and Electric Company*, 302 U.S. 388, 58 S. Ct. 334, 82 L. ed. 319 16

Rachicle v. *Marsico*, 303 Pa. 372 18

Rees v. *Watertown*, 86 U.S. (19 Wall.) 107, 22 L. ed. 72 19

Roller v. *Holly*, 176 U.S. 398, 20 S. Ct. 410, 44 L. ed. 520 15

Rose v. *Turnpike Company*, 3 Watts (Pa.) 46 16

Saint Louis Southwestern Railway Company, United States, ex rel. v. *Interstate Commerce Commission*, 264 U.S. 64, 44 S. Ct. 294, 68 L. ed. 565 13

Senn v. *Tile Layers Protective Union*, 301 U.S. 468, 57 S. Ct. 857, 81 L. ed. 1229 11

Shambo v. *D. and H. Railroad Company*, 288 Pa. 240 19

Smith and Springer, Administrators v. *Woolfork*, 115 U.S. 143, 5 S. Ct. 1177, 29 L. ed. 357 18

Southern Pacific Company v. *Bogert*, 250 U.S. 483, 39 S. Ct. 533, 63 L. ed. 1099 22

Southern Railway Company v. *Virginia, ex rel. Shirley*, 290 U.S. 190, 54 S. Ct. 148, 78 L. ed. 260 16

Standard Oil Company of California v. *Johnson*, 316 U.S. 481, 62 S. Ct. 1168, 86 L. ed. 1611 11

Temperance Association v. *Friendly Society*, 187 Pa. 38 21

Turner, United States ex rel. v. *Fisher*, 222 U.S. 203, 32 S. Ct. 37, 56 L. ed. 165 15

United States, ex rel. Saint Louis Southwestern Railway Company v. *Interstate Commerce Commission*, 264 U.S. 64, 44 S. Ct. 294, 68 L. ed. 565 13

BLEED. THROUGH POOR COPY

Page

United States, ex rel. Turner v. *Fisher*, 222 U.S. 203, 32 S. Ct. 37, 56 L. ed. 165 15

United States v. *Abilene and Southern Railway Company*, 265 U.S. 274, 44 S. Ct. 565, 68 L. ed. 1016 18

Vichosky v. *Boucher*, 162 Pa. Super. 598 19

Ward v. *Love County*, 253 U.S. 17, 40 S. Ct. 419, 64 L. ed. 751 19

West Ohio Gas Company v. *Public Utilities Commission of Ohio*, 294 U.S. 63, 55 S. Ct. 315, 79 L. ed. 761 13

Williams v. *Kaiser*, 323 U.S. 471, 65 S. Ct. 353, 89 L. ed. 398 19

STATUTES AND OTHER AUTHORITIES CITED

Act of June 25th, 1948, c. 646, 62 Stat. 929, 28 U.S.C. 1257(2) 1

Constitution of the United States, Fourteenth Amendment 2

Pennsylvania Insurance Company Law of May 17th, 1921, Section 339, P. L. 682, (40 P. S. 460) 21

Pennsylvania Insurance Department Act of May 17th, 1921, as amended, P. L. 789:

- Section 213 2
- Section 311 5
- Section 321 2
- Sections 501 through 507, inclusive, (40 P. S. 51, 131, and 201 through 207, inclusive) 2

Pennsylvania Law 682, Section 339 21

Pennsylvania Law 789:

- Section 213 2
- Section 311 5
- Section 321 2
- Sections 501 through 507, inclusive 2

Pennsylvania Statutes, Volume 40:

- Page 51 2
- Page 92 5
- Page 131 2
- Pages 201 through 207, inclusive 2, 3
- Page 460 21

United States Code, Title 28, Section 1257(2) 1

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 229

ROLAND O. HAINES, ET AL., COMPRISING KEYSTONE POLICYHOLDERS' COMMITTEE,

Appellants,

vs.

COMMONWEALTH OF PENNSYLVANIA, ET AL.

STATEMENT AS TO JURISDICTION

Roland O. Haines, et al., comprising Keystone Mutual Policyholders' Committee, appellants, joined by Max J. Perks, et al., comprising the Perks' Committee of intervening creditors in compliance with Rule 12 of the Rules of the Supreme Court of the United States submit herewith their statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question.

(a) Statutory Provision Believed to Sustain Jurisdiction

The statutory provision believed to sustain jurisdiction is the Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U. S. C. 1257(2).

The judgment appealed from was rendered by the Supreme Court of Pennsylvania, which is the highest court

of the State in which a decision could be had, and there was drawn in question the validity of the Pennsylvania Insurance Department Act of May 17, 1921, as amended, P. L. 789, Secs. 213, 321 and 501-507 incl. (40 P. S. 51, 131, 201-207, incl.) as construed to authorize a summary order by the Court of Common Pleas dissolving a mutual casualty insurance company without notice to the company, its officers or members of intent to apply for such dissolution order and without an order to show cause and full hearing on such application, on the grounds that such statutes as construed and applied deprived appellants of property without due process of law in violation of the 14th Amendment to the Federal Constitution. The decision was in favor of the validity of the statutes as construed.

(b) The Statutes of Pennsylvania, the Validity of Which Are Involved

Section 213 of the Pennsylvania Insurance Department Act of May 17, 1921, as amended, P. L. 789 (40 P. S. 51) provides for the examination of domestic insurance organizations by the Insurance Commissioner and requires that:

> "The Insurance Commissioner shall grant a hearing to the corporation or other insurer or organization examined before filing such report * * *."

Section 321 of the Pennsylvania Insurance Department Act of May 17, 1921, P. L. 789, (40 P. S. 131) provides that:

> "* * * the commissioner shall, in case he finds the capital or reservoir of the company or exchange impaired twenty per centum, give notice to the company or exchange to make good the capital or reserve within sixty days."

Sections 501-507 incl. of the Pennsylvania Insurance Department Act of May 17, 1921, as amended, P. L. 789

(40 P. S. 201-207) provide the method and machinery for the suspension from business, restoration and involuntary dissolution of domestic insurance organizations. Sections 501, 503 and 507 are of no particular significance here except as comprising part of the statutory plan.

Section 502 requires that when the Insurance Commissioner determines a domestic insurance company is insolvent, or otherwise in a hazardous condition, or is being operated in violation of law, he shall communicate the facts to the Attorney General who shall, after hearing, apply to the appropriate court of common pleas for an order to show cause why the organization's business should not be closed, and the Insurance Commissioner should not take possession of its property and conduct its business, and for such other relief as the nature of the case and the interests of its policyholders, creditors, stockholders, or the public may require.

Section 504 requires the order to show cause and the papers upon which it is issued, to be served upon the organization in the manner prescribed for the personal service of summons upon a domestic corporation; that in the event the officers of the organization depart, or keep themselves concealed, service of the order to show cause may be in such manner as the court shall direct.

Section 505 provides that on such application or at any time thereafter, the court may in its discretion restrain the organization from the transaction of business or disposition of its property until further order of the court. It requires the court, after a full hearing, to deny the application or direct the Insurance Commissioner to take possession of the property and conduct the business until, on application, after like hearing, it appears that the causes for continued custody shall have been removed.

Section 506 is the dissolution section. It provides in part:

LEED. THROUGH POOR COPY

"If, on a like application and order to show cause, and after a full hearing, the court shall order the liquidation of the business of such company, * * * such liquidation shall be made by and under the direction of the Insurance Commissioner, who shall be vested by operation of law with title to all of the property, contracts, and rights of action of such company * * * as of the date of the order so directing him to liquidate * * *."

The full text of the statutes drawn into question is set out in the appendix.

(c) Date of Judgment and of Application for Appeal

Judgment was entered on December 8, 1952 but did not become final until April 4, 1953 when a timely motion for reargument was denied. The petition for appeal was presented after notice June 29, 1953.

(d) Statement Showing Jurisdiction

A brief statement of the facts is necessary to exhibit the unconstitutionality of the statute.

Cf. *General Oil Co.* v. *Crain*, 209 U. S. 211, 228, 52 L. Ed. 754, 764.

Keystone Mutual Casualty Company, organized in Pennsylvania, had accumulated the surplus of more than one-half million dollars required by statute to write non-assessable policies, and had qualified to do so. (R. 1672a).

In its annual statement as of December 31, 1946, filed with the insurance department of the various states in which it did business, it shows a surplus of $1,439,066.36. (R. 1735 a-1; 1795a).

On May 21, 1947, representatives of the Insurance departments of Pennsylvania, Maryland and Kentucky commenced an examination of the company participated in by three examiners with seven or eight assistants. (R. 885a; 977a; 1344a; 1430a).

Within a few days after the examination commenced Nathan P. Kann, secretary and general manager of the company, and A. J. O'Leary, vice-president, and their attorney called at the office of the Pennsylvania Insurance Commissioner (R. 859a), admitted certain false entries in the company's books which were reflected in its annual report for 1946 (R. 816a) but which increased the reported surplus by only $225,000.00 (see *Commonwealth* v. *O'Leary*, 168 Pa. Super. 569, 572, 79 A. (2d) 789, 790) and that the company was not solvent (R. 816a) but urged that the company could be restored to a technically healthy financial condition before the end of the year by the almost automatic reduction of "run-off" of its unearned premium reserve. (R. 816a et seq.). The Commissioner did not discontinue the examination but suggested ways of raising money to put into the company (R. 819a-822a; 863a; 869a) but did not tell them the amount required (R. 869a).

On June 2, 1947, the Insurance Commissioner of Maryland, before the results of the examination were known, sent telegrams to all of the company's agents in Maryland not to accept any more business for the company (R. 822a) and on June 4, 1947, the Pennsylvania Insurance Commissioner sent Mr. Kann a telegram instructing the company not to write any new or renewable non-assessable policies which was the only type it was authorized to write and for all practical purposes the company was out of business. (R. 823a).

The examiners, finding the claims files at the home office insufficient to establish a proper claim liability on an individual case basis (R. 1816a) as required by Sec. 311 of the Pennsylvania Insurance Department Act as amended (40 P.S. 92) instead of visiting branch offices, substituted a statistical expedient based upon an analysis of only 175 cases out of a total of many thousands (R. 1510a), on that basis concluded that the company's reserve liability and

workman's compensation losses should be increased by an additional $1,511,255.73 (R. 1797a) and on June 6, 1947 arrived at a penciled balance sheet purporting to show that as of December 31, 1946 the aggregate of the company's liabilities and its reserves thus increased exceeded its assets by $1,590,412.15 (R. 1434a). It was then shown to Messrs. Kann and O'Leary who did not testify but were reported by other witnesses to have raised no objection to it, and to have said "you have presented the figures more kindly than I would". (R. 1346a-1348a; 1432a-1433a).

On June 13, 1947, the Pennsylvania Insurance Commissioner wrote to the Attorney General requesting that he proceed under Section 502 of the Pennsylvania Insurance Department Act of May 17, 1921 (P.L. 789) as amended. (R. 1756a).

On June 14, 1947, a notice in the form of a letter addressed to M. D. Hoffman, President of the Company, summoning the Company, its officers and directors to appear for a hearing before the Pennsylvania Department of Justice on June 25, 1947 (R. 1760a) was given to the State police for service upon the officers and directors of the company (R. 300a, 301a). This notice set out that the Department of Justice had been advised by the Insurance Commissioner that the Company

> "* * * is in such condition that further transaction of business by it will be hazardous to policyholders, creditors and the public in that the company has been mismanaged, has been accepting and writing business which no conservative company would write, maintains inadequate claim records, has reported as of December 31, 1946, a surplus when in fact there was a deficit and has issued cash or non-assessable policies beyond the date when the company was possessed of sufficient surplus as required by law (copy of said statement is hereto attached)" (R. 1760a).

The company's license was suspended by the Pennsylvania Insurance Commissioner on June 16, 1947. (R. 878a, 879a).

The report of preliminary examination by the examiners was completed on June 23, 1947. (R. 1431a, 1070a, 1071a).

No copy of the report of examination was sent to the Company or its officers (R. 855a, 856a, 268a), nor was it given a hearing before the filing of the report. It was given no formal notice with respect to the impairment of its reserves, nor was it granted the statutory time to make good the impairment. (R. 231a, 238a).

On June 24, 1947, the company's directors adopted resolutions requesting the Pennsylvania Insurance Commissioner

> "* * * to immediately take charge of the affairs of the Company in order to conserve the assets of the Company for the benefit of all concerned; and it is further resolved that in order to facilitate any action of any person or company to purchase or rehabilitate the Company, the resignation of all of the officers and directors having been submitted to the Company are hereby accepted and are herewith enclosed."
> "AND BE IT FURTHER RESOLVED, That N. P. Kann is hereby authorized and empowered to join with the Insurance Commissioner in behalf of the Keystone Mutual Casualty Company in any legal action necessary for the Insurance Commissioner to take charge of the Company." (R. 1761a; 1840a).

All of the officers had resigned except Mr. J. D. O'Neil, Vice-President whose resignation was to be effective June 30, 1947 (R. 1763a).

At the hearing on June 25, 1947, before a Deputy Attorney General, Hearing Examiner, there were no officers or directors of the Company present (R. 296a). No policyholders or creditors had been notified unless they were officers and had received the letter of June 14th (R. 294a, 295a). The Company was represented at the hearing by

an attorney who had not seen the report of examination, who had no opportunity to examine it, and who understood that the purpose of the hearing was to put the Company in the hands of the Insurance Commissioner for rehabilitation (R. 1765a, 1774a). The evidence submitted consisted of the report of examination and of its identification (R. 1755a-2-1786a). It was at this hearing that the proposal was first made by the Deputy Attorney General representing the Insurance Department that the Company be put into the hands of the Insurance Commissioner for liquidation (R. 1776a). The hearing which lasted less than an hour, was finished about 12:30 (R. 297a). That same afternoon a suggestion was prepared asking the Court of Common Pleas to enter a decree under Section 506 of the Pennsylvania Insurance Department Act of May 17, 1921 (P. L. 789) placing the Company in the hands of the Insurance Commissioner for liquidation (R. 1833a). The attorney for the Company would not agree to the decree nor to any action beyond having the Insurance Commissioner take over because that was the extent of his authority (R. 299a). He signed a joinder waiving issuance of the rule and notice, accepting service, and consenting to the granting of the relief prayed,

> "* * * to the extent of the authorization contained in the resolution of the Board of Directors of Keystone Mutual Casualty Company, adopted June 24, 1947, a copy of which is hereto attached" (R. 1839a).

Neither the attorney nor any representative of the company either urged or agreed that the company be liquidated (R. 303a).

The suggestion was presented to Judge Hargest of the Court of Common Pleas in chambers the following morning. At an informal hearing, lasting not more than one-half hour, of which no record was made, and at which the

Company was not represented, an order was entered dissolving the Company, vacating its charter and directing the Insurance Commissioner to liquidate its affairs (R. 280a; 283a; 285a; 1951a).

The present inquiry was initiated by the successor Attorney General and Insurance Commissioner of Pennsylvania who, after the Company had been re-examined by independent accountants engaged for the purpose, filed a petition to set aside the liquidation decree of June 26, 1947 on the grounds that it was entered as a result of a mistake of fact concerning the solvency of the Company. The petition prayed that the decree be vacated to the extent that it required liquidation of the Company and vacation of its charter; and that the Insurance Commissioner be authorized to present a plan for the Company's rehabilitation (R. 12a-14a). Appellants joined in the prayer of the petition (R. 14a; 194a).

The Commonwealth and appellants contended in the lower court that the Company and its policyholders were deprived of their property without due process of law in violation of the Federal Constitution by the failure to afford to them any, much less adequate, notice of application for a liquidation order as required by Section 506 of the Insurance Department Act; by failure to grant a full hearing on such application as required by that section; by failure to give them an opportunity to inspect and defend at a hearing against the report of special examination as required by Section 213 of the Act; by the failure to afford them the statutory right to repair the alleged reserve deficiencies contrary to the requirements of Section 321 of the Act. Notwithstanding the mandatory nature of these safeguards in the Insurance Department Act, the Court of Common Pleas decided against these contentions (R. 1735a-1739a). Upon appeal, the Supreme Court of

BLEED. THROUGH POOR COPY

Pennsylvania Middle District, in response to the challenge that appellants were deprived of their property without due process of law under the Federal Constitution held that there was adequate notice and ample opportunity to be heard in June 1947 and consequently no failure of due process. With respect to the statutory requirements of an order to show cause and full hearing under Section 506 of the Insurance Department Act, it said:

> "In the light of all these unusual and indisputable facts, it would strain our credulity to believe and it would be stretching the technicalities of the law far beyond reason for us to hold that the officers and directors of this company did not have adequate notice of the hearing, or that they did not waive the technical requirements of the Insurance Code, or that the Court did not have the right to authorize and direct the Insurance Commissioner to take possession of the Company."

A timely Motion for Reargument asserted that the statute as construed to authorize the summary dissolution order without both notice and hearing violated the guaranty of due process contained in the Federal Constitution. The necessary effect of the decision by the Supreme Court of Pennsylvania affirming the order of the Common Pleas Court which refused to vacate the liquidation order, as well as its denial of the Motion for Reargument was to affirm the validity of the statute construed and applied to permit entry of a liquidation order without opportunity to resist it. Appeal was taken to this Court.

(e) Authorities Believed to Sustain Jurisdiction

28 U. S. C. 1257.

A Federal question affording a jurisdictional basis for review by the Supreme Court was presented by the attack

on the validity under the 14th Amendment to the Federal Constitution of the State statutes as construed and applied to permit the entry of a liquidation order without opportunity to resist it, and the decision of the highest State court gave effect to the statutes as so construed and applied.

Myles Salt Company v. *Board of Commissioners of the Iberia & St. Mary Drainage District,* 239 U. S. 478, 36 S. Ct. 204, 60 L. ed. 342;

Fiske v. *Kansas,* 274 U. S. 380, 47 S. Ct. 655, 71 L. ed. 1108;

Darling v. *Newport News,* 249 U. S. 540, 39 S. Ct. 371, 63 L. ed. 759;

Dahnke-Walker Milling Company v. *Bondurant,* 257 U. S. 282, 42 S. Ct. 106, 66 L. ed. 239;

Appeal is the proper procedure for review.

Standard Oil Co. of Cal. v. *Johnson,* 316 U. S. 481, 62 S. Ct. 1168, 86 L. ed. 1611;

Senn v. *Tile Layers Protective Union,* 301 U. S. 468, 57 S. Ct. 857, 81 L. ed. 1229.

(f) Authorities Showing That the Questions Are Substantial

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Mullane v. *Central Hanover Bank and Trust Co.,* 339 U. S. 306, 314, 70 S. Ct. 652, 94 L. ed. 865, 873 and cit.

The notice must be of such nature as reasonably to convey the required information.

Mullane v. *Central Hanover Bank and Trust Co.,* 339 U. S. 306, 314, 70 S. Ct. 652, 94 L. ed. 865, 873;

Grannis v. *Ordean*, 234 U. S. 385, 34 S. Ct. 779, 58 L. ed. 1363;

DeLucca's Liquor License Case, 124 Pa. Super 500.

The only formal notice that the Company or anyone connected with it received prior to the hearing before the Trial Examiner on June 25th was the letter of June 14th directed to the President of the Company. It was based upon a request by the Insurance Commissioner that the Attorney General proceed under Section 502 of the Pennsylvania Insurance Department Act which provides for the Insurance Commissioner to take possession of its property and "conduct its business." Liquidation is provided by a separate section of the Act.

The complaints set out in the letter covered a much wider field but were no more specific than that condemned in *Morgan* v. *United States*, 304 U. S. 1, 19, 58 S. Ct. 773, 83 L. ed. 1129, 1133, where the notice was of an inquiry into the reasonableness of rates charged by a sheep commission company for stockyard services at Kansas City. The acts of mismanagement referred to were not specified. The nature of the business which the company had been accepting and writing, which no "conservative" company would write was not set out. The inadequacy in the claim records was not indicated. The complaints that the Company had reported as of December 31, 1946 a surplus when in fact there was a deficit and had issued cash or non-assessable policies beyond the date when the company was possessed of sufficient surplus as required by law was based wholly upon the findings of examiners, who adopted a statistical expediency to arrive at their conclusions, and whose report, which was not even completed until June 23rd, was never furnished or made available to the Company in advance of the hearing. It had no chance in advance of the hearing to examine and meet the preliminary data upon which

the Insurance Commissioner's and Hearing Examiner's conclusions were founded sufficient to enable it to point out any errors which existed.

U. S. ex rel St. Louis Southwestern Railway Company v. *Interstate Commerce Commission*, 264 U. S. 64, 79, 44 S. Ct. 294, 68 L. ed. 565, 569;

Morgan v. *United States*, 304 U. S. 1, 58 S. Ct. 773, 82 L. ed. 1129.

The first information conveyed to any representative of the Company that it was to be put in the hands of the Insurance Commissioner for liquidation under Section 506 of the Insurance Department Act, a separate and distinct statutory proceeding, was at the hearing on June 25th. There still had been no opportunity to study and meet the report of examination. The attorney for the Company, whose authority was limited to acquiescing in the custody of the Company by the Insurance Commissioner for rehabilitation, limited his joinder in accordance with his authority, of which counsel for the Commonwealth and the Court had notice. There was no chance afforded to resist the shift in the proceedings from custody for purposes of rehabilitation to liquidation, adopted without warning, and executed summarily within the space of twenty-four hours. Such action has been condemned as an exercise of arbitrary power, at variance with "the rudiments of fair play" long known to our law. The Fourteenth Amendment condemns such methods and defeats them.

West Ohio Gas Company v. *Public Utilities Commission of Ohio*, 294 U. S. 63, 70, 71, 55 S. Ct. 315, 79 L. ed. 761, 769;

Re William Oliver, 333 U. S. 257, 272, 273, 68 S. Ct. 499, 92 L. ed. 682, 694;

Cole v. *Arkansas*, 333 U. S. 196, 68 S. Ct. 514, 92 L. ed. 644;

Cooke v. *United States*, 267 U. S. 517, 538, 45 S. Ct. 390 69 L. ed. 767, 774.

The informal and casual notice of the claim by the examiners that the Company was insolvent, given on June 6th to Messrs. Kann and O'Leary by showing them a penciled balance sheet, unaccompanied by the detail of a report of the examination, did not meet the requirements of due process. These were the officers who had admitted falsifying the records, thereby deceiving the policyholders and creditors; their interests were no longer the same. As they were subject to prosecution they might derive some personal benefit from cooperating with the Insurance Commissioner. Notice to an adversary does not comply with due process.

Mullane v. *Central Hanover Bank and Trust Company*, 339 U. S. 306, 316, 70 S. Ct. 652, 94 L. ed. 865, 874.

Even if the penciled statement shown to the defaulting officers were sufficient to put the Company on notice of the claim that it was insolvent, the Company had the right to assume that it would be afforded the sixty days' notice to make good its capital or reserve provided by Section 321 of the Pennsylvania Insurance Department Act, and that it would not be liquidated without the order to show cause and full hearing required by Section 506 of that Act.

City of New York v. *New Haven & Hartford Railroad*, Company, Decided Jan. 12, 1953 — U. S. —, 97 L. Ed. (Advance p. 268, 271).

However such extra-official or casual notice cannot be deemed a substantial substitute for the due process of law that the Constitution requires.

Coe v. *Armour Fertilizer Works*, 237 U. S. 413, 424, 35 S. Ct. 625, 59 L. ed 1027, 1032;

Mullane v. *Central Hanover Bank and Trust Company*, 339 U. S. 306, 315, 70 S. Ct. 652, 94 L. ed. 865, 874.

Even such information as may have reached the Company through extra-official or casual notice, through the letter of June 14th, or at the hearing on June 25th did not afford a reasonable time for those interested to take any effective action. The examination of the Company commenced on May 21, 1947, although participated in by three examiners and seven or eight assistants, was not completed until June 23, 1947. It was upon this report of examination, never even shown to the Company's representative until the hearing before the Attorney General June 25, 1947 held to determine whether the Insurance Commissioner should take possession of the Company's affairs, that the penciled balance sheet, the letter of June 14th and the hearing on June 25th were based. Obviously time was not afforded to peruse the report of examination; much less to determine its accuracy. And the dissolution of the Company which was not even suggested until June 25th, was an accomplished fact twenty-four hours later. Thus another fundamental requirement of due process of law was violated. The notice must afford reasonable time for those interested to make their appearance.

Mullane v. *Central Hanover Bank and Trust Company*, 339 U. S. 306, 70 S. Ct. 652, 94 L. ed. 865;

Roller v. *Holly*, 176 U. S. 398, 20 S. Ct. 410, 44 L. ed. 520;

U. S. ex rel Turner v. *Fisher*, 222 U. S. 203, 32 S. Ct. 37, 56 L. ed. 165;

Hovey v. *Elliott*, 167 U. S. 409, 17 S. Ct. 841, 42 L. ed. 215;

DeLucca's Liquor License Case, 124 P. Super. 500;

Armour Transportation Co. v. *Pennsylvania Public Utility Comm.* 138 Pa. Super. 243;

Commonwealth v. *O'Keefe*, 298 Pa. 169.

There was no need for such unseemly haste. The Company had been notified on June 2nd to cease writing the only type of policies it was then authorized to write. Its license had been suspended on June 16th. It could have been controlled by placing it in the hands of the Insurance Commissioner without dissolution, under Section 502 of the Pennsylvania Insurance Department Act and by injunction, if necessary, under Section 505 of the same Act. The scheme of the statute itself contemplated a hearing before the filing of the special report of examination (Section 213) and at least sixty days during which the Company could make good any impairment of its capital or reserve (Section 321).

Cf. Southern Railway Company v. *Virginia, ex rel. Shirley*, 290 U. S. 190, 197, 54 S. Ct. 148, 78 L. ed. 260, 265.

There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when the minimal requirement of due process has been neglected or ignored.

Ohio Bell Telephone Company v. *Public Utilities Commission of Ohio*, 301 U. S. 292, 305, 57 S. Ct. 724, 81 L. ed. 1093.

The fact that all of the officers and directors of the Company except one had resigned prior to the hearing on June 25th did not dispense with the necessity of notice of the abrupt shift to a proceeding for liquidation under Section 506 of the Act but made the need for some sort of notice to the policyholders even more apparent. The resignation of the officers and directors did not effect a dissolution of the Company.

Comm. v. *First National Bank of Easton*, 303 Pa. 241;
Rose v. *Turnpike Co.*, 3 Watts (pa) 46;
Rachiele v. *Marsico*, 303 Pa. 372;
Comm. ex rel. Claghorn v. *Cullen, et al.*, 13 Pa. St. 133.

The names and addresses of the policyholders were known to the Commonwealth or available to it. Where it was obvious that in this proceeding for liquidation which was to be accorded finality there had been no notice reasonably calculated under all the circumstances to apprise the policyholders of the impending dissolution of the Company, and where their names and post office addresses were at hand, there was no reason for not resorting to the mails by which a notice, likely to reach most, would have safeguarded the interest of all as a class.

Mullane v. *Central Hanover Bank and Trust Company*, 339 U. S. 306, 318, 70 S. Ct. 652, 94 L. ed. 865, 875.

Apparently on June 27, 1947, the day after the dissolution decree, facilities were available to the Commonwealth to notify policyholders, creditors and all parties interested in the Company of its dissolution and of the order barring claims after June 25, 1948 (R. 1945a).

It was within the authority, and was the obligation of the Court to direct some other adequate manner for service of the order to show cause if the officers of the Company were not available. Sec. 504, Pennsylvania Insurance Department Act of May 17, 1921, P. L. 789 as amended (40 P. S. 204).

In view of the complete failure of adequate and timely notice, the informal conference of 30 minutes in Judge Hargest's chambers at which no testimony was taken and no record made, and at which neither the Company, its policyholders or creditors were represented, was not the fair and open hearing required by due process of law; it was a pretense and a sham. Again there was violated a fundamental concept of due process.

Palko v. *Connecticut*, 294 U. S. 70, 71, 58 St. Ct. 149, 82 L. ed. 288, 293 and cit;

United States v. *Abilene & Southern Railway Company*, 265 U. S. 274, 288, 289, 44 S. Ct. 565, 68 L. ed. 1016;
Interstate Commerce Commission v. *Louisville & Nashville Railroad Company*, 227 U. S. 88, 93, 33 S. Ct. 185, 57 L. ed. 431, 434.

The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement.

Ohio Bell Telephone Co. v. *Public Utilities Commissioner of Ohio*, 301 U. S. 292, 304, 305, 57 S. Ct. 724, 81 L. ed. 1093, 1101, 1102;
Railroad Commission of Colorado v. *Pacific Gas & Electric Co.*, 302, U. S. 388, 393, 58 S. Ct. 334, 82 L. ed. 319, 322.

In holding that "it would be stretching the technicalities of the law far beyond reason for us to hold that the officers and directors of this company did not have adequate notice of the hearing * * *" the Pennsylvania Supreme Court, by construction and application, has effectively denuded the Pennsylvania Insurance Department Act of the fundamental requirements of due process of law which it considered so essential in *National Auto Corporation* v. *Barford*, 289 Pa. 307. By so doing, it has deprived appellants as well as the Company and all other policyholders and creditors of those fundamental rights guaranteed under the due process clause of the Federal Constitution.

So much of the order of June 26, 1947, as provided for the dissolution of the company and the vacation of its charter, having been entered without the notice and hearing required by due process, is void and of no effect.

Interstate Commerce Commission, v. *Louisville & Nashville Railroad Company*, 227 U. S. 88, 33 S. Ct. 185, 57 L. ed. 431;
Smith and Springer, admr. v. *Woolfolk*, 115 U. S. 143, 5 S. Ct. 1177, 29 L. ed. 357;

Griffin v. *Griffin*, 327 U. S. 220, 66 S. Ct. 556, 90 L. ed. 635;
Lancaster and Mintzers Appeal, 111 Pa. 524;
Vichosky v. *Boucher*, 162 Pa. Super. 598;
Manlin v. *Tener*, 146 Pa. Super. 593;
Shambo v. *D & H. R. R. Co.*, 288 Pa. 240, 245;
Hughes v. *Hughes*, 306 Pa. 75.

Accordingly, the heavy burden placed upon the petitioners and intervenors in the action to set aside the dissolution order was improperly cast. Whether after notice and a full hearing which complies with due process, the same result would be reached need not be considered here. It is no answer to one who protests against the taking of his property without due process of law that due process of law would have led to the same result.

Coe v. *Armour Fertilizer Works*, 237 U. S. 314, 424, 35 S. Ct. 625, 59 L. ed. 1027, 1032;
Rees v. *Watertown*, 86 U. S. (19 Wall.) 107, 123, 22 L. ed. 72, 77.

The Supreme Court of Pennsylvania in addition to holding that the officers and directors of the Company had adequate notice of the hearing, appears to also rely upon the non-Federal ground of waiver of "the technical requirements of the Insurance Code." This ground is so plainly untenable that it may not be used to defeat the jurisdiction of the Supreme Court of the United States.

Ward v. *Love County*, 253 U. S. 17, 40 S. Ct. 419, 64 L. ed. 751;
Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine et al. v. *Michaux*, 279 U. S. 737, 49 S. Ct. 483, 73 L. ed. 931;
Williams v. *Kaiser*, 323 U. S. 471, 65 S. Ct. 353, 89 L. ed. 398;
Magwire v. *Tyler*, 75 U. S. (8 Wall. 650, 19 L. ed. 320.

The proceedings had been custodial only until the hearing on June 25th. There was no prior notice of the proposalto proceed under Section 506 for the dissolution of the Company. As there was no warning of the shift of the custodial proceedings into an effort to liquidate the Company, so also there was no consent to it. Acquiescence in the loss of fundamental rights will not be presumed.

Ohio Bell Telephone Company v. *Public Utilities Commission of Ohio*, 301 U. S. 292, 307, 57 S. Ct. 724, 81 L. Ed. 1093, 1103.

The resolution of the directors on June 24th spelled out their understanding and purpose. They were requesting the Insurance Commissioner to immediately take charge of the affairs of the Company "in order to conserve the assets of the Company for the benefit of all concerned." They were resigning "in order to facilitate any action of any person or company to purchase or rehabilitate the Company." Accordingly, they authorized a joinder in behalf of the Company with the Insurance Commissioner "in any legal action necessary for the Insurance Commissioner to take charge of the Company."

The joinder signed by the Company's attorney to the suggestion praying that the Company be placed in the hands of the Insurance Commissioner for dissolution consented to the granting of the relief prayed for only "to the extent of the authorization contained in the resolution of the Board of Directors of Keystone Mutual Casualty Company, adopted June 24, 1947, copy of which is hereto attached." He specifically stated that the farthest he could agree was to go along on having the Insurance Commissioner take over, because that was what the resolution stated "and that is what my authority is". He could not agree to the decree (R. 299a). The undisputed testimony of the Deputy Attorney General who represented the Insurance Commissioner

at the hearing on June 25, 1947 and who originated the idea of dissolution and prepared the suggestion and joinder was that neither the attorney nor any representative of the Company either urged or agreed that the Company be liquidated; quite the contrary, they were insistent they could get more money and put the company in good shape (R. 302a, 303a).

There was no doubt between the parties at the hearing with respect to the limited authority of the Company attorney and the meaning of the resolution. There can be none now, both because of the plain language of the resolution and the undisputed evidence. But however the State Court may seek authority to sustain its action, it cannot derive it from the officers or directors, for they had no authority to consent to the dissolution of the Company or to waive it into extinction.

Sec. 339. Pennsylvania Insurance Company Law of May 17, 1921, P. L. 682 (40 P. S. 460);
Temperance Association v. *Friendly Society*, 187 Pa. 38;
Bedford Railroad Co. v. *Bowser*, 48 Pa. 29;
Comm. ex rel. Claghorn et al. v. *Cullen, et al.*, 13 Pa. St. 133, 141;
Baker's Appeal, 109 Pa. 461.

The State Supreme Court also suggested a failure to object to the decree "for a period of over 3½ years" apparently not as a separate non-Federal basis for its decision, but to indicate a lack of faith in the constitutional objections. If considered as a non-Federal ground for the decision it is equally untenable. The Matlack Committee of policyholders intervened on June 2, 1948. The appellant policyholders committee, which succeeded the Matlack Committee intervened in a timely fashion to continue its challenge.

Comm. ex rel Chidsey v. *Keystone Mutual Casualty Co.*, 366 Pa. 149.

That petition was still pending on December 18, 1950, when the Attorney General and Insurance Commissioner challenged the validity of the dissolution decree.

When the class was thus represented, it was not essential that each member of the class intervene in the action in order to be free from laches. Nor, where due diligence was used, would failure, long continued, to discover the appropriate remedy establish laches.

Southern Pacific Company v. *Bogert*, 250 U. S. 483, 489, 39 S. Ct. 533, 63 L. Ed. 1099, 1106.

(g) Time and Method of Raising the Federal Question

The Commonwealth and appellants contended in their argument before the lower court en banc that the Company, its policyholders and creditors were denied procedural due process of law in violation of the Fourteenth Amendment to the Federal Constitution by the failure to accord to them any, much less adequate, notice of application for liquidation order as required by Section 506 of the Insurance Department Act, by the failure to grant them a full hearing on such application as required by the same section, by the failure to grant the hearing to the corporation required by Section 213 of the Insurance Department Act of May 17, 1921, as amended, P. L. 789 (40 P. S. 51) and by the failure to grant it the sixty days to repair alleged reserve deficiencies required by Section 321 of the same Act (40 P. S. 131). It was also contended there that the Company and its member policyholders and creditors were deprived of their property without due process of law by the dissolution decree of June 26, 1947 because it was entered without compliance with the notice and hearing provisions of Section 506 of the Insurance Department Act of May 17, 1921, P. L. 789 (40 P. S. 206). The lower court considered these questions and decided them against the Commonwealth (R. 1735a-1739a).

On appeal to the Supreme Court of Pennsylvania, appellants again asserted that the decree of liquidation of June 26, 1947 violated the applicable statutes and was a denial of due process of law, to the prejudice of appellants' rights, pointing out that Sections 502 and 5-6 of the Pennsylvania Insurance Department Act of May 17, 1921, P. L. 789 (40 P. S. 202, 206) "are constitutional only because they contain the carefully stated provisions outlined above, for the issuance of the order to show cause, for its service and the service of the Attorney General's pleading upon the respondent company, and for a full hearing before the Court" (Brief for Appellant in Supreme Court of Pennsylvania, Middle District, pp. 33-49). The Supreme Court of Pennsylvania decided these questions against the contention of appellants. It held that there was adequate notice and ample opportunity to be heard in June, 1947, and consequently no failure of due process; that the statutory provisions under which the court acquired the right to authorize and direct the Insurance Commissioner to take possession of the company for the purpose of liquidating it had either been complied with or that these "technical requirements of the Insurance Code" had been waived by the officers and directors of the company.

This necessarily constituted a decision that the Act as construed and applied, was valid against the constitutional objection.

Appellants in their Motion for Reargument asserted that the Pennsylvania Insurance Department Act of May 17, 1921, as construed by the Supreme Court of Pennsylvania to permit a summary order of liquidation without notice of the proceedings appropriate to the nature of the case and adequate to safeguard the rights of the parties and an opportunity to be heard violated the guaranty of due process of law contained in the Federal Constitution. In denying

the Motion for Reargument on April 4, 1953 the Supreme Court of Pennsylvania necessarily considered and passed on the question against the contention of appellants.

ELLIS G. ARNALL,
CLEBURNE E. GREGORY, JR.,
WALTER M. NEWMAN,
Counsel for Appellants.

ARNALL, GOLDEN AND GREGORY,
WALKER AND NEWMAN,
Of Counsel.

APPENDIX "A"

OPINION OF THE SUPREME COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA DATED DECEMBER 8TH, 1952

No. 27 May Term, 1952

In re: COMMONWEALTH OF PENNSYLVANIA Ex Rel. T. McKEEN CHIDSEY, Attorney General

v.

KEYSTONE MUTUAL CASUALTY COMPANY: KEYSTONE MUTUAL POLICYHOLDERS' COMMITTEE, Intervenor; WILLIAM GOLDSTEIN, et al., Intervenors; MAX J. PERKS et al., Intervenors; CLAUDE B. HANLEY, Ancillary Receiver of the State of Maryland, Intervenor; and KURT HITKE AND COMPANY, et al., Intervenors

Appeal of Keystone Mutual Policyholders' Committee from the Final Order of the Court of Common Pleas of Dauphin County, Pennsylvania, March 17, 1952, at Commonwealth Docket No. 129 of 1947

OPINION OF THE COURT

BELL, *J.*:

An appeal was taken to this Court from the dismissal by the Court below, on March 17, 1952, of a petition to vacate a decree of Court made on *June 26, 1947*. That decree was unappealed from and unchallenged for a period of approximately three and one-half years, during which time the Keystone Mutual Casualty Company was in the hands of the Insurance Commissioner of Pennsylvania for purposes of liquidation in accordance with the Court's decree. The decree of June 26, 1947 has been recognized ever since its entry by 26 of our sister states which have accorded it full faith and credit in accordance with Article IV, Sec. 1 of the Constitution of the United States.

This case originated in June 1947 in a statutory proceeding, initiated by the Attorney General of Pennsylvania at

---

• P.L. 789, 40 PS 202-206.

the relation of the Insurance Commissioner of the Commonwealth, for the dissolution of the Keystone Mutual Casualty Company, a Pennsylvania casualty insurance company, pursuant to the provisions of Secs. 502-506 of the Insurance Department Act of May 17, 1921. On June 26, 1947, the Court of Common Pleas of Dauphin County entered a final decree directing the Insurance Commissioner to take possession of the company's property and ordering the dissolution of the company and the liquidation of its assets.

Three and one-half years later, to-wit, on December 18, 1950, the succeeding Attorney General and the succeeding Insurance Commissioner petitioned the Court of Common Pleas of Dauphin County to vacate its decree of June 26, 1947, *on the ground that it was entered under a mistake of fact.* Various parties were permitted to intervene in the proceedings in the Court below. See *Commonwealth ex rel. Chidsey v. Keystone Mutual Casualty Company*, 366 Pa. 149 76 A. 2d 867. The petition to vacate was supported by a "Policyholders' Committee"; it was opposed by a committee of creditors called the "Goldstein Committee" and by the Insurance Commissioner of Maryland, and by insurance agents from the State of Illinois who were creditors and known as the "Hitke Committee."

The Commonwealth in its petition to vacate alleged (1) that the Casualty Company was solvent (a) on June 26, 1947, and (b) as of the time of the filing of the petition of December 18, 1950; and (2) that the vacation of the decree of June 26, 1947, was sought for the purpose of rehabilitation of the company. No plan of rehabilitation was attached to the petition or offered at the trial and the Court below doubted that an acceptable plan could, under all the conditions here present, be devised. Judge Neely, after lengthy hearings, found in a very able and painstaking opinion of 97 pages; (1) that the decree of dissolution of June 26, 1947 was validly entered; (2) that the Commonwealth and the intervenors who supported the petition to vacate the decree of 1947 had the burden of proving that the decree was entered under a mistake of fact or law; and (3) that the petitioners failed to sustain their burden of proof. The "Policyholders' Committee" took an appeal from the decree of the

Court below which dismissed the Commonwealth's petition to vacate, but the Commonwealth, which was the original petitioner, refused to take an appeal or to join in this appeal. The Insurance Commissioner in his answer to a petition for supersedeas, doubts whether a rehabilitation of the company could not be consummated even if the company were solvent, and avers that "he believes that compliance with (the) admonitions (of the Court below) is in the best interest of the public and of the company, its creditors and policyholders and will not adversely affect the interest of any of them and that further delay would be subversive of the interest of the public, policyholders, creditors and claimants". Briefs were filed in support of the appellant by the "Perks Committee"; and in opposition to the appellant's position by the "Goldstein Committee" and by the "Hitke Committee."

The appellant intervenors contend that the decree of June 26, 1947, was void (1) because it was based upon a mistake, viz., insolvency, and (2) because it was entered without the required notice or hearing, and (3) because the Court erred in placing the burden of proof of solvency on the Commonwealth.

From the record and briefs totaling more than 2000 pages, we briefly summarize the important facts.

The principal place of business of the Keystone Mutual Casualty Company was in Pittsburgh, Pennsylvania. As of December 31, 1946, the company was writing 19 different classes of casualty insurance and had approximately 1000 agents who were operating in 26 states in which the company was authorized to do business. From this business it derived net premiums in 1946 in excess of 7½ million dollars. In its annual statement filed with the Insurance Department of the Commonwealth, as well as with the Insurance Department of other states, the company reported a surplus as of December 31, 1946, of $1,439,066.36. This report aroused the suspicions of the officers of the Insurance Department of Maryland and of the Insurance Director of the State of Kentucky, who called certain items in the report and certain practices of the company which they considered unsound and improper to the special attention of the Insurance Com-

missioner of Pennsylvania. In May of 1947, the Insurance Commissioner directed that a special examination should be made of the Keystone Mutual Casualty Company, which was joined in by examiners representing the Insurance Commissioner of Kentucky and of Maryland. Shortly after the examination was begun, N. P. Kann, Secretary, Director, Chairman of the Finance Committee, and the active Manager of the company, and A. J. O'Leary, Vice-President, Director and Comptroller of the company, came with the company's attorney to the office of the Insurance Commissioner in Harrisburg to discuss the company's affairs. During the course of this conference with the Insurance Commissioner *both Kann and O'Leary admitted that the company was insolvent.* They also admitted that the annual statement of December 31, 1946, deliberately concealed the extent of the company's liabilities; thus enabling the company to show a surplus. Kann requested the Insurance Commissioner to discontinue the examination and to permit the company to operate for the balance of the year in the hope that the company could "run off" the bad debts on its books before the regular examination which would be held on or about January 1, 1943. The Insurance Commissioner refused to discontinue the examination and insisted that additional funds must immediately be raised, otherwise the company would be taken over by the Insurance Department. He also notified the District Attorney of Allegheny County of the criminal acts of Messrs. Kann and O'Leary. The officers and directors were unable to borrow additional funds to bring the reserves up to the legal requirements and to rehabilitate the company. Kann and O'Leary were convicted in Allegheny County on a criminal charge arising out of the falsification of the company's books. On June 1, 1947, the Insurance Commissioner of Maryland ordered the company to cease doing business in that state. Upon being informed of this action, the then Insurance Commissioner of Pennsylvania, Mrs. James F. Malone, Jr., on June 2, 1947, prohibited the writing of any new business.

On June 6, 1947, the Insurance Commissioner's examiners (as a result of their examination and preliminary report) reported to the Commissioner and also to Messrs. Kann and

O'Leary that they found the company was insolvent, and that it had a deficit of over 1½ million dollars. *Mr. Kann said he could not object to the examiner's findings; Mr. O'Leary admitted that "you have presented the figures more kindly than (I) would."* On June 13, 1947, Mr. Malone prohibited the company from doing any further business and notified the Attorney General that the company *had a deficit of $1,590,412.15 and because of its mismanagement was in a hazardous condition.* On June 14, 1947, pursuant to the request of the Insurance Commissioner, the Department of Justice of the Commonwealth sent the following notice to the President of this company:

"Sir:

The Insurance Commissioner of Pennsylvania has advised this office under date of June 13, 1947, that the Keystone Mutual Casualty Company, Pittsburgh, Pennsylvania, of which you are President, is in such condition that *further transaction of business* by it *will be hazardous* * to policyholders, creditors and the public in that the company has been mismanaged, has been accepting and writing business which no conservative company would write, maintains inadequate claim records, *has reported as of December 31, 1946 a surplus when in fact there was a deficit* and has issued cash or nonassessable policies beyond the date when the company was possessed of sufficient surplus as required by law (copy of said statement is hereto attached.)

The Company is summoned to appear for a hearing before this department. The date, time and place of hearing is fixed for June 25, 1947, at 11:00 A.M.D.S.T., Conference Room, Department of Justice, Second Floor, Main Capitol Building, Harrisburg, Pennsylvania, when and where the officers of the company, you and Messrs. N. P. Kann and E. J. Kann, D. L. McLay, A. J. O'Leary and J. D. O'Neil are directed to appear in person with whatever records you may desire to produce at that time and accompanied by any witnesses

* Italics throughout, ours.

you may desire to testify. You may be represented by counsel in this matter as may the other officers of the company. Testimony will be taken at this hearing.

Yours very truly,

GEORGE W. KEITEL,
Deputy Attorney General."

On June 24, 1947, the Board of Directors of Keystone Mutual Casualty Company, adopted the following Resolution:

"Whereas, the Company has been advised that the reserves of the Company do not meet the legal requirements of the Insurance Department of the Commonwealth of Pennsylvania; and

Whereas, the Company has made *many efforts* to raise sufficient moneys to bring the reserves up to the legal requirements; and

Whereas, the Company has been unable since it was notified that its reserves were inadequate to raise the additional moneys necessary to bring the reserves of the Company up to the legal requirements; and

Whereas, the Company has been ordered not to do business except the right to collect premiums and cancel policies;

Now, therefore, upon motion of N. P. Kann, seconded by S. M. Hartman, be it resolved that the *Insurance Commissioner* of the State of Pennsylvania *is hereby requested to immediately take charge of the affairs of the company in order to conserve the assets of the Company for the benefit of all concerned;* and it is further resolved that in order to facilitate any action of any person or company to purchase or rehabilitate the Company, the resignation of all of the officers and directors having been submitted to the Company are accepted and are hereby enclosed.

"AND BE IT FURTHER RESOLVED, *That N. P. Kann is hereby authorized and empowered to join with the Insurance Commissioner in behalf of the Keystone*

Mutual Casualty Company in any legal action necessary for the Insurance Commissioner to take charge of the Company.

Dated June 24, 1947."

The hearing before the Attorney General on June 25th was attended by counsel representing the Keystone Mutual Casualty Company, by a representative of the Insurance Commissioner of Pennsylvania, and by representatives of the Insurance Commissioners of five states, at which time it was discovered that in accordance with the Resolution of June 24, 1947, all of the officers and directors of the company except one Mr. O'Neil, had submitted their resignations to the Insurance Commissioner to be effective on June 24, 1947; Mr. O'Neil's resignation was also delivered, but was to be effective as of June 30, 1947. The Attorney General notified those present at this hearing that he intended to petition the Court for *liquidation* of the company.

Following this hearing the Attorney General filed a Suggestion, sworn to by the Insurance Commissioner, in the Court of Common Pleas of Dauphin County, setting forth that there was a deficit of more than 1½ million dollars and continued operation of the business would be hazardous to the policyholders, creditors, and to the public, and requested that the company be placed in the possession of the Insurance Commissioner for purpose of dissolution. *At no time did a director or officer of, or attorney for, the corporation, deny the insolvency of the corporation or object to the company's being placed in the possession of the Insurance Commissioner for liquidation.* Moreover, the attorney for the company on June 25, 1947, joined in writing in the prayer of the Suggestion and *waived* the issuance of a rule and notice *and consented to the granting of relief prayed for* "to the extent of the authorization contained in the resolution of the Board of Directors of Keystone Mutual Casualty Company, adopted June 24, 1947, . . ." a copy of which was attached to the waiver.

On June 26, 1947, after an informal hearing in the chambers of Judge Hargest, the following order and final decree of dissolution was entered:

"ORDER AND FINAL DECREE

"And now, June 26, 1947, it appearing to the Court that the Attorney General of the Commonwealth of Pennsylvania, at the relation of the Insurance Commissioner of the Commonwealth, has filed herein a Suggestion dated June 25, 1947, praying for a Rule upon the Keystone Mutual Casualty Company, its agents, officers and employees, enjoining and restraining them from transacting any of the business of said Company or disposing of any of its property, and enjoining and restraining all persons from instituting or prosecuting any actions at law or in equity against Keystone Mutual Casualty Company and directing Keystone Mutual Casualty Company to show cause why its business should not be closed and the Insurance Commissioner of the Commonwealth of Pennsylvania should not take possession of its property and conduct its business, and after full hearing by said court to order that said Keystone Mutual Casualty Company be dissolved, its charter vacated and its corporate existence ended, and its business and affairs liquidated by and under the direction of the Insurance Commissioner and for such other relief as the nature of the case and the interest of its policyholders, creditors and the public may require; and it further appearing that prior to the issuance of the said Rule the said Keystone Mutual Casualty Company, appeared by its attorney, *waived the issuance of the Rule*, accepted service of the same, *and consented to possession of the company by the Insurance Commissioner;* and it further appearing that said Keystone Mutual Casualty Company, *is insolvent and in such condition that its further transaction of business would be hazardous* to its policyholders or its creditors or to the public, there is hereby entered the following:

FINAL DECREE

AND NOW, June 26, 1947, it is ORDERED, ADJUDGED AND DECREED that the business of said Keystone Mutual Casualty Company be "closed and the Insurance Commissioner of the Commonwealth of Pennsylvania be, and he hereby is, directed to take possession of the property of Keystone

Mutual Casualty Company in accordance with the provisions of the Act of the General Assembly of May 17, 1921, (P.L. 789); that the said Keystone Mutual Casualty Company be hereby dissolved, its charter vacated and its corporate existence ended, and its business and affairs liquidated by and under the direction of the said Insurance Commissioner of the Commonwealth of Pennsylvania."

Notwithstanding these facts, on June 10, 1950 the succeeding Insurance Commissioner employed Wolfe, Corcoran & Linder, consulting actuaries and insurance accountants, to make an evaluation of the assets and liabilities of this company. The report of this firm (the so-called Linder Report) sets forth *as of June 30, 1950*,—not as of June 30, 1947—the company had a surplus of $589,722.80 and as of May 30, 1951, of $444,808.93. In reliance upon the Linder Report the succeeding Insurance Commissioner, Artemas C. Leslie, and the succeeding Attorney General, Charles J. Margiotte, on *December 18, 1950*, filed the present petition to vacate the Court's decree of dissolution dated *June 26, 1947*.

This petition to vacate affirmatively alleges that the Casualty Company was solvent on June 26, 1947, as well as on the date of the petition and that the Court's decree dated June 26, 1947, was entered under a mistake of fact and was therefore void. Petitioner has the burden of proving the facts alleged: *O'Neill v. Metropolitan Life Insurance Co.*, 345 Pa. 232, 26 A. 2d 398; *DeReeder v. Travelers Insurance Company*, 329 Pa. 328, 198 A. 45; *Berritz v. New York Life Insurance Company*, 169 Pa. Superior Ct. 496, 52 A. 2d 363. Moreover the new Insurance Commissioner, acting through the new Attorney General of the Commonwealth, was seeking to vacate a decree of a Court of Record, and in such case the burden of proof is a heavier one; the evidence must be clear, positive, and so convincing as to move a Court of Equity to grant the relief prayed for: Cf. *Bosler v. Sun Oil Company*, 325 Pa. 411, 191 A. 718; *Exchange Bank & Trust Co., Trustee v. Bartley*, 350 Pa. 585, 39 A. 2d 833.

The principles of law applicable to petitions to open judgment are equally applicable to a petition to vacate a decree and the grant or refusal of such a petition is within the

discretion of the Court below and its decision will not be reversed except where there is a manifest abuse of discretion.

"An application to open a judgment is addressed to the equitable powers of the court, and if, on the pleadings and proofs, doubt exists as to the real justice and equity of the case, the court below will not be reversed on appeal: Massey v. Massey, 267 Pa. 239, 242; Tressler v. Emerick, 278 Pa. 128, and cases cited": *Reidlinger v. Cameron*, 287 Pa. 24, 27, 134 A. 418.

". . . the grant or refusal of a motion to open judgment rests entirely within the discretion of the court below and will not be disturbed except where there is manifest abuse of discretion": *Perri v. Perri*, 335 Pa. 394, 6 A. 2d 775; *Schuylkill Trust Co. v. Sobolewski*, 325 Pa. 422, 190 A. 919.

In order to determine whether the decree of the court below dated June 26, 1947, was valid, it is necessary first to consider (1) the provisions and requirements of the Insurance Code of May 17, 1921,* and (2) the constitutional requirement of due process, i.e., notice of a hearing and an opportunity to be heard. These are so closely related that they will be considered together.

What are the pertinent and important statutory requirements? Section 502 of the Insurance Department Act of May 17, 1921,* provides: "Whenever any domestic insurance company, . . . (a) *is insolvent;* . . . or (e) is found, after an examination, to be in such condition that *its further transaction of business will be hazardous* to its policyholders, or to its creditors, or to the public; *or* (f) *has wilfully violated its charter or any law of the Commonwealth;* . . . the Insurance Commissioner shall communicate the facts to the Attorney General, who shall, after hearing, apply to the court of common pleas . . . for an order directing such company to show cause why its business should not be closed, and the Insurance Commissioner should not take possession of its property and conduct its business, *and for such other relief as the nature of the*

---

* P. L. 789, as amended, 40 PS 202.

case and the interests of its policyholders, creditors, stockholders, or the public may require."

Section 506 provides: "If, on a like application and order to show cause, and after a full hearing, the court shall order the liquidation of the business of such company, such liquidation shall be made by and under the direction of the Insurance Commissioner, who shall be vested by operation of law with title to all of the property . . ."

The fundamental requirements of due process in a proceeding affecting property interests are (1) a notice or proceedings appropriate to the nature of the case and adequate to safeguard the rights of the parties, and (2) an opportunity to be heard. *Anderson National Bank v. Luckett*, 321 U. S. 233; *Dohany v. Rogers*, 281 U. S. 362, *Ballard v. Hunter*, 204 U. S. 241; *Union Trust Co. of Pittsburgh* case, 359 Pa. 363. Notwithstanding the indisputable fact that the company had full knowledge of the proceedings and had received an appropriate notice thereof and was given ample opportunity to be heard therein, neither the company nor its directors nor officers nor policyholders nor the present intervenors appeared or made any objection to the proposed liquidation of the company or to the decree of the Court below for a period of over 3½ years. Indeed, the present petition to vacate does not allege or raise any issue as to lack of notice or opportunity to be heard, but merely alleges a mistake as to the solvency of the company; the issue of due process was raised for the first time during the argument before the Court en banc. The reasons why this issue was previously raised must be obvious; there was adequate notice and ample opportunity to be heard in June 1947 and consequently there was no failure of due process.

With respect to the statutory requirements, appellant contends that no order to show cause was issued or served and no notice of the Court proceedings and no copy of the Suggestion of the Attorney General was given to the company or to any of its officers or directors; and that there was no full hearing before the Court as required by the Insurance Code. It is indisputable that the officers and directors of the company knew and admitted in the middle of June

BLEED. THROUGH POOR COPY

1947 that the company was insolvent and in an unsound, hazardous condition; it is indisputable that on June 24, 1947, the Board of Directors of this company requested the Insurance Commissioner of Pennsylvania to immediately take charge of the affairs of the company in order to conserve its assets for the benefit of all concerned; it is indisputable that the officers and directors of the company knew that the Attorney General of the Commonwealth was holding a hearing on June 25, 1947, for the purpose of having possession of the company taken over by the Insurance Commissioner; and it is indisputable that on June 25, 1947, at the hearing in the Attorney General's office the attorney for the company appeared and notified the Attorney General that the company could not raise sufficient additional funds to rehabilitate the Company and that all its officers and directors had resigned; it is indisputable that the attorney for the company on June 25, 1947, in the office of the Attorney General, waived in writing * issuance of any rule in the proceedings and notice thereof, and accepted service of the rule and notice, and consented to the granting of relief prayed for in the within suggestion to the extent of the authorization contained in the resolution of the Board of Directors of Keystone Mutual Casualty Company adopted June 24, 1947, ** a copy of which was thereto attached; and it is likewise indisputable that on June 26, 1947, the day of the Court's decree, the attorney for the company waived in writing the issuance of an order or rule to show cause and notice and thereafter entered a general appearance for the company and consented in writing to the Court's order delivering possession of the company to the Insurance Commissioner of Pennsylvania.

In the light of all these unusual and indisputable facts, it would strain our credulity to believe and it would be

---

* This waiver was signed by the attorney for the company and for N. P. Kann, who is Secretary of the Company and Chairman of the Finance Committee and its leading Director, as well as the company's then authorized agent and attorney-in-fact.

** Appellant seeks to limit this consent to a taking of possession of the company for conservation and rehabilitation instead of for liquidation of the company.

COPY BOUND TOO CLOSE IN CENTER

stretching the technicalities of the law far beyond reason for us to hold that the officers and directors of this company did not have adequate notice of the hearing, or that they did waive the technical requirements of the Insurance Code, or that the Court did not have the right to authorize and direct the Insurance Commissioner to take possession of the company for the purpose of liquidating it.

Having determined that the decree of the Court dated June 26, 1947, was validly entered, the next question to arise is what clear, positive and convincing evidence did the Commonwealth or the intervenors produce to justify a vacation or even a modification of the decree? The Commonwealth in the Court below and the intervenors in this Court have attempted to establish one point and one point only, viz., that the company was solvent on June 26, 1947, as well as at the time of the filing of the petition to vacate on December 18, 1950, and as of the time of the trial in May, 1951. Their proof consisted of two kinds: (1) An attempt to show that the report of the special examiners in June, 1947, did not prove insolvency and hence did not justify the Court's decree of June 26, 1947, and (2) by producing a report by actuaries appointed by the succeeding Insurance Commissioner showing the financial condition of the company *as of December, 1950,* and using this as a basis to establish—by reconstructing and adjusting certain items therein—insolvency as of June, 1947.

The Court below found that the report of the special examiners in June, 1947 as well as the Linder report of December, 1950, were, for reasons hereinafter discussed, inaccurate and undependable. Such a finding, without more, would not be sufficient to satisfy the intervenors' burden of proving that the company was solvent on June 26, 1947, and in December, 1950 (or at the time of the trial), or that the company was not in an unsound and hazardous condition in June, 1947, and in December, 1950.

The Court below specifically found upon competent and adequate evidence:

"76. This company was *insolvent on December 30, 1950,* and there has been no statement of assets and liabilities giving a comparison of the financial condition at the time

BLEED. THROUGH POOR COPY

of the hearing as compared to the date of the admitted insolvency.

55. The computations of the actuarial experts in this case are complex and conflicting and they do not establish, either individually or collectively, that this company was solvent on June 26, 1947. On the contrary, it is established that this *company was in an unsound financial condition on June 26, 1947.*

78. The finances of this company were in an unsound condition at June 26, 1947 from the standpoint of this company's policyholders, the creditors and the public as well.

79. There was *gross mismanagement* of this company's affairs, including the misstatement of the financial condition to the insurance authorities of this State and other States, and the maintenance of inadequate claim records.

80. This company prior to June 26, 1947 had wilfully violated the laws of this Commonwealth, in that its officers committed criminal acts for which they were convicted in connection with the manipulation of the company's records.

81. As of June 26, 1947, the officers and directors of this company had ceased to function, and therefore the company was without any active management or ability to continue to operate as a going concern.

82. On June 26, 1947 the transaction of further business would have been hazardous from the standpoint of the security and protection of the policyholders, creditors and the public as well.

* * * * * * *

86. It is not established that this company was solvent at the time of the hearing in this case."

Appellant does not and cannot challenge or refute the finding of gross mismanagement, maintenance of inadequate claims records, unsound practices, criminal misstatements of the company's financial condition, violation of its charter and of the law, or that the company was in June, 1947, in an extremely hazardous condition. It challenges only those findings pertaining to insolvency; it seeks equitable relief, in the last analysis, on the sole ground of solvency then and now. In view of the findings of the Insurance

COPY BOUND TOO CLOSE IN CENTER

Commissioner and of the Court in June, 1947 and of the admissions of the company's officers and directors of the insolvency of the company in June, 1947, which was acquiesced in by 26 States, it would take strong evidence at this late date to overcome these facts and to prove that the company was solvent in June, 1947. The trial judge and the Court en banc found that no such evidence was produced.

The difference between the examiners and other experts as to the solvency or insolvency of the company revolves principally around two liability items (1) "reserves for liability", and (a) "the unearned premium reserve." The Court below found that the examiners' report showing as of June, 1947, an additional reserve for liability and compensation losses in the amount of $1,511,255.93, was inaccurate and undependable, for the reason in substance that it was based upon a case-by-case examination of only 175 claims out of several thousand claims and some erroneous computations therefrom. The claims records of the company in the remaining claims were so inadequate and contained such meager information that an accurate case-by-case determination was impossible and consequently the examiners determined the balance of necessary reserves on a percentage method derived from the percentage of undervaluation found in the aforesaid 175 claims. The Court below found that this item in the report was necessarily inaccurate and that some of the computations were erroneous, without determining whether the "reserves for liability" was higher or lower than that found by the examiners, or what it actually amounted to, or what the actual deficit of the company was. Such a mistake was not conclusive proof on the important issue of solvency; it is not sufficient proof that the financial condition of the company was not what it was represented to be and what its officers and directors admitted it to be merely because some part of the examiners' report was inaccurate. Moreover, the Court specifically found that the company in June, 1947 was in an unsound financial condition and the transaction of further business would have been hazardous to policyholders, creditors and public alike.

BLEED. THROUGH POOR COPY

The other item upon which the examiners and other expert witnesses strongly disagreed was the inclusion or exclusion in the company's reserve for unearned premiums of an item of $281,632.60 which was set up by the examiners as an additional reserve for advance premium deposits. We have studied the conflicting testimony on this issue and believe it sufficient to say that we agree with the court below that "we do not feel that the Commonwealth has met the burden imposed upon it of (clearly proving) that the item of $281,732.60 was improperly included as a liability by the examiners in their reserve for unearned premiums."

The Court below also refused to accept the Commonwealth's so-called "Linder Report" and the inferences therefrom as sufficient to establish that the company was solvent either on June 26, 1947, or on December 18, 1950. It would unnecessarily lengthen this opinion to analyze and review the controversial Linder report, which the lower Court discussed at great length and found insufficient to clearly establish solvency either in December, 1950, or in June, 1947. We agree with and adopt the following excerpt from the Opinion of the Court below:

"There has been no balance sheet submitted on behalf of the Commonwealth showing the assets and liabilities of the company as of December 31, 1946. The method used by the Commonwealth in making limited use of disputed figures to establish a surplus without the use of a balance sheet is not (convincing). One cannot read this record and form a valid conclusion that this company was solvent on June 26, 1947. Any adjudication on the basis of the evidence before this Court that there was solvency as of that date would be based upon pure conjecture.

The sum total of the evidence indicates that this Company was in a precarious financial condition on June 26, 1947. Its affairs were mismanaged, its records manipulated, and its financial condition "had been fraudently misrepresented by its officers. These conditions, taken in connection with the admissions of insolvency made by its officers to the Insurance Commissioner, make us firm in our conviction that in order to prevail in its petition to vacate our decree, the Commonwealth must meet the burden . . .

COPY BOUND TOO CLOSE IN CENTER

of affirmatively proving the solvency of this company as alleged in the petition."

The findings of the Court below are supported, we repeat, by competent and adequate evidence. Moreover, they are buttressed by the important admissions made by the Insurance Commissioner of Pennsylvania in filing a Federal income tax return for the company for 1950 which showed that the company was insolvent at the time when he claims in this suit it was solvent.

While appellant objected to the admission of this income tax return, it was clearly admissible as an admission against interest, thus affecting both the weight and credibility of the testimony.

All of the other contentions of each of the parties in this unusually complicated case have been considered, but further discussion is deemed unnecessary.

Order affirmed: appellant-intervenors to pay the costs.

Justice CHIDSEY did not participate in the consideration or decision of this case.

BLEED. THROUGH POOR COPY

APPENDIX "B"

OPINION OF THE SUPREME COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA DATED NOVEMBER 22ND, 1950

Nos. 20, 21 and 22

May Term, 1951

In Re COMMONWEALTH OF PENNSYLVANIA, ex rel., T. McKEEN CHIDSEY, Attorney General,

v.

KEYSTONE MUTUAL CASUALTY COMPANY

No. 20—APPEAL OF CHARLES J. MARGIOTTI, Attorney General of the Commonwealth of Pennsylvania

No. 21—APPEAL OF ARTENAS C. LESLIE, Insurance Commissioner of the Commonwealth of Pennsylvania

No. 22—APPEAL OF ROLAND O. HAINES, EDWARD CHADDERTON, EDMOND J. DWYER, HAROLD KANE and JOHN D. O'NEIL, constituting the Keystone Mutual Policyholders' Committee

Appeals from Order of the Court of Common Pleas of Dauphin County, Pennsylvania, at Commonwealth Docket No. 129 of 1947

OPINION

STEARNE, *J.*:

There are three appeals from the refusal of the Court of Common Pleas of Dauphin County to permit the intervention of a policyholders' committee in a dissolution and liquidation proceeding relating to the Keystone Mutual Casualty Company, a Pennsylvania corporation. Appellants are the Commonwealth's Attorney General, its Insurance Commissioner and the Committee. The Statutory Liquidator interposes no objection to the intervention but

reserves his right to question the validity of any plan of rehabilitation. The Ancillary Receiver for the State of Maryland intervened as a party defendant in opposition to any plan of rehabilitation.

The reasons which motivated the Court to deny the intervention may be thus summarized: (a) a decree of dissolution was entered by the Court; (b) that after corporate dissolution there can be no reestablishment of the corporate entity; (c) that there is no authority for the proposed plan to turn over the assets to officers and directors of the dissolved company; (d) that an intervenor takes the litigation "as he finds it" and this petition is in effect "an attack upon the proceedings" and is in the nature of a bill for review. Perhaps the foundation of the Court's objection is, as stated in its opinion, "*Were we to allow this petition, we would be required to hear evidence and pass upon the validity of our decree (of dissolution)* * * *."

On June 26, 1947, upon suggestion filed by the then Attorney General, and with the consent of the company, "(The) Court, by order dated June 26, 1947, ordered and directed the Keystone Mutual Casualty Company to be dissolved, and directed that the Insurance Commissioner of this Commonwealth take possession of the assets of the company, as Statutory Liquidator, in accordance with the provisions of Section 506 of the Insurance Department Act of May 17, 1921, P. L. 789, as amended, 40 P. S. Sec. 206. The Court ordered that the company be closed, its charter vacated and its corporate existence ended, and further directed that its business affairs be liquidated by and under the direction of the Statutory Liquidator."

On June 2, 1947, a policyholders protective committee was granted leave to intervene. In its petition it was averred that the Committee believed that the company was not insolvent; that its assets far exceeded the liabilities and expressed the belief that reinstatement and rehabilitation of the company was "feasible". This Committee consisted of six members representing policyholders, and whose chairman was Duverney Matlack and was thereafter referred to as the Matlack Committee. On *February 21, 1950* the court granted permission to this Committee to withdraw as inter-

vening party "* * * with leave to make further appearance at a later date for the purpose of requesting an appropriate allowance for expenses and counsel fee of said Committee * * *". On *March 10, 1950* the present application to intervene was made by five authorized individuals, as a Policyholders' Protective Committee, which was denied as indicated. This appeal followed.

Policyholders of a mutual insurance company are interested parties. Such a company is a co-operative enterprise wherein the policyholders, as members, are both insurer and insured. Upon insolvency of the company the policyholders, as members, are liable for their proportionate share of indebtedness: 44 C. J. S., Insurance, Sec. 104, p. 644, et seq. In a *dissolution* there can be no doubt but that such individuals are interested parties. Under the Rule of Civil Procedure 2327, 12 P. S. Appendix, such persons are permitted to intervene because the proceeding may impose liability upon them. As stated in the commentary to the rule, the right to intervene is not a grant of an absolute right "without regard to the approval of the court." Cf. In re *Frey's Estate*, 237 Pa. 269, 85 A. 147; *Northampton Trust Company, Trustee v. Northampton Traction Co. et al.*, 270 Pa. 199, 112 A. 871; *Bily, Ex'x. v. Allegheny County Board of Property Assessment*, Appeals and Review, 353 Pa. 49, 44 A. 2d 250. Rule 2328 requires a petition to intervene "*setting forth the ground on which intervention is sought*". Rule 2329 provides that the application may be refused by the court: (1) if not in subordination to and in recognition of the propriety of the action; (2) the interest of petitioner is already adequately represented; (3) undue delay in making application.

In compliance with these rules the petition, dated *March 10, 1950*, recited the above facts; that because of the withdrawal by leave of court of the prior Policyholders' Protective Committee on *February 21, 1950* the policyholders no longer had representation in the proceeding; that the corporation was in fact solvent, and not insolvent as was represented to the court. In an amended petition a detailed plan of proposed rehabilitation was set forth.

We have then petitioners who possess the status of intervenors and pleadings which comply with the applicable rules

of civil procedure. These petitioners are not officious intermeddlers in litigation in which they have no interest. It does not necessarily follow that if intervention is permitted, the court is required to grant permission to rehabilitate. If the corporation is insolvent, and its charter forfeited, it may be beyond the power of the court to permit a rehabilitation or reorganization.

The objection which appears to be the most formidable is whether under Procedural Rule No. 2329 (1) this application "*is not in subordination to and in recognition of the propriety of the action.*" The general rule is that an intervenor must take the suit "as he finds it". *Northampton Trust Company, Trustee, v. Northampton Traction Co., et al.*, 270 Pa. 199, 112 A. 871. Cf. *Franklin National Bank et al.* v. *Kennerly Coal & Coke Co.*, 300 Pa. 479, 483, 150 A. 902.

It is noted that in both petitions to intervene (June 2, 1948, Matlack Committee and the present one Haines Committee) the averment is made that the corporation is solvent. Furthermore the decree of insolvency and dissolution *was based entirely upon a consent decree.* The court was not required *to find facts* on which to base its decree, because of such consent of the officers of the corporation, *who thereupon resigned.* We agree with the learned court below that an intervenor should not be allowed to become a party to the suit merely to review what the court has done and to require demonstration of the legality and propriety of its action. But *arguendo*, if an intervenor sought to establish that a group of insurance companies had contributed a fund to pay all debts and costs of an insolvent insurance company, ought such intervention be denied? Under such circumstances why should the decree of dissolution not be vacated and the company rehabilitated? In the absence of good reason to the contrary we think not. If it were shown that the company was and is *solvent* and the decree was entered because of fraud, accident or mistake, intervention should not be denied. Such proofs would not be in derogation of the decree filed. As this was a *consent decree* it might be shown that the decree was improvidently made and upon erroneous information. We agree that an intervenor cannot question supported findings of facts made

prior to the intervention. But neither the court below nor an appellate court should pass upon the propriety of the proposed rehabilitation *prior to intervention*. If the corporation is insolvent, it may well be that no rehabilitation is possible under the Insurance Statute, supra.

Policyholders are not now represented in these proceedings. Their rights are now being considered by the court and their property is about to be distributed. We see no reason why a policyholders' committee should not intervene, if for no other purpose than to protect such interest.

There has been no undue delay. The policyholders were protected by the Matlack Committee until it was permitted to withdraw, February 21, 1950, and promptly, on March 10, 1950, the present application was made.

Curiously enough the only ones objecting to intervention are two *amici curiae*, one of whom is E. Brooke Matlack, *who was chairman of the Matlack Committee*. In his brief, so filed as *amicus curiae*, it is said that he "*will argue in behalf of himself and of all policy holders, creditors and claimants.*" It is further stated that Mr. Matlack is the largest policyholder-creditor who desires nothing more than the expeditious liquidation of the dissolved company and the payment of claims to the extent that the assets will permit.

We are unable to ascertain from this record the identity of the other *amicus curiae* but whoever he is he was represented by an able member of the Philadelphia Bar who states in his argument: "The Petition to Intervene by this alleged policyholder's committee is a bold and brazen attempt to seize substantial assets of a defunct insurance company. It represents an attempt by a small group to seek professional treatment in contravention of law. The purported sponsorship of the intervention by the present Attorney General and Insurance Commissioner is shocking. The appeal lacks merit."

It is difficult to understand how the petitioning committee, if permitted to intervene, could possibly secure possession of the assets. The funds are in the hands of the Statutory Liquidator and are, therefore, under the direct supervision of the court.

It is most persuasive that the Commonwealth's Insurance

Commissioner, as well as its Attorney General, join the committee in this appeal. No sound reason has been presented why the intervention should not be allowed. Great loss could result from a denial of intervention and no harm can result if allowed. Policyholders, because of their pecuniary interest, are entitled to have representation in this litigation even though ultimately there is a liquidation and distribution of assets.

We specifically withhold judgment on the question whether rehabilitation is proper under the circumstances, as well as approval of any proposed rehabilitation or reorganization.

The decree is reversed and the record is remitted to the court below to enter an appropriate decree in accordance with this opinion. All costs to be paid out of the fund.

APPENDIX "C"

FULL TEXT OF PENNSYLVANIA STATUTES THE VALIDITY OF WHICH IS DRAWN IN QUESTION

Pennsylvania Insurance Department Act of May 17, 1921, as amended, P. L. 789, Secs. 213, 321, 501, 502, 503, 504, 505, 506, and 507, 40 P. S. 51, 131, 201, 202, 203, 204, 205, 206, and 297.

"Section 213 (40 P. S. S. 51). (As amended by the Act of May 24, 1933, P. L. 982). EXAMINATION OF COMPANIES, ET CETERA.—The Insurance Commissioner shall require every domestic insurance company, association, and exchange to keep its books, records, accounts and vouchers in such manner that he or his authorized representatives may readily verify its annual statements, and ascertain whether the company, association, or exchange has complied with the provisions of law. He shall, every three years, or oftener if he deems it to be necessary, personally or by his deputy, actuary, or examiners, visit each domestic insurance company, association, and exchange, and thoroughly inspect and examine its affairs to ascertain its financial condition and its ability to fulfill its obligations, whether it has complied

with the provisions of law, and any other facts relating to its business methods and management, and the equity of its plans and its dealings with its policyholders. He may, in like manner, when he determines it to be prudent for the protection of policyholders in this Commonwealth, compel the attendance of officers or visit and examine, in person or by his deputy or examiners, any insurance company, association, or exchange of another State or foreign government applying for admission or already admitted to do business in this Commonwealth.

In lieu of such examination, the Insurance Commissioner may accept the report of examination made by or upon the authority of the supervising official of any other State.

The Insurance Commissioners shall grant a hearing to the corporation or other insurer or organization examined before filing such report, and may withhold any such report from public inspection for such time as he may deem proper, and may, if he deems it for the interest of the public to do so, publish any such report or the results of any such examination as contained therein in one or more newspapers of the State."

"(d) IMPAIRMENT OF CAPITAL AND RESERVES. Section 321 (40 P. S. S. 131). NOTICE OF IMPAIRMENT OF FUNDS.—Having charged as a liability the reinsurance and loss reserves as above defined for insurance companies and exchanges of this Commonwealth other than life insurance companies, and adding thereto all other debts and claims against the company or exchange, the commissioner shall, in case he finds the capital or reserve of the company or exchange impaired twenty per centum, give notice to the company or exchange to make good the capital or reserve within sixty days."

"Section 501 (40 P. S. S. 201). (As amended by Act of June 22, 1931, P. L. 616). SUSPENSION OF BUSINESS OF INSURANCE COMPANIES, ET CETERA, BY INSURANCE COMMISSIONER.—The Insurance Commissioner shall suspend the entire business of any domestic insurance company, association, or exchange, fraternal benefit society or beneficial society, and the business within this Commonwealth of any insurance company, association, or exchange, or fraternal

benefit society or beneficial society of another State or foreign government, during its non-compliance with any provision of law obligatory upon it, or whenever he shall find that its assets are insufficient to justify its continuance in business, by suspending or revoking its certificate of authority granted by him. If such insurance company, association, or exchange, fraternal benefit society or beneficial society was incorporated, organized, or is operating without authority of law, the commissioner shall have equal authority to suspend or dissolve as if a certificate of authority had been granted by law. If upon examination or other evidence exhibited to him, the Insurance Commissioner is of opinion that any insurance company, association, or exchange, or fraternal benefit society or beneficial society, or an officer or agent thereof, has violated any provision of the insurance laws, he shall report the facts to the Attorney General, who, under the direction of the Insurance Commissioner, shall take such legal action as the case may require."

"Section 502 (40 P. S. S. 202). (As amended by Act of July 12, 1935, P. L. 958.) APPLICATIONS TO COURT TO TAKE OVER BUSINESS OF COMPANIES, ET CETERA, FOR PROTECTION OF POLICYHOLDERS, CREDITORS, ET CETERA.—Whenever any domestic insurance company, association, exchange, title insurance company, fraternal benefit society, or beneficial society, or order, including all corporations, associations, societies, and orders which are subject to examination by the Insurance Commissioner or which are doing, or attempting to do, or representing that they are doing, the business of insurance in this Commonwealth, or which are in process of organization intending to do such business there—(a) is insolvent; or (b) has refused to submit its books, papers, accounts, or affairs to the reasonable inspection of the Insurance Commissioner or his deputy or examiner; or (c) has neglected or refused to observe an order of the Insurance Commissioner to make good within the time prescribed by law any deficiency, whenever its capital, if it be a stock company, or its reserves, if it be a mutual company, an association, exchange, title insurance company, fraternal benefit society, or beneficial society, or order shall have become impaired; or (d) has, by contract of reinsur-

ance or otherwise, transferred or attempted to transfer substantially its entire property or business, or entered into any transaction the effect of which is to merge substantially its entire property or business in the property or business of any other company, association, exchange, title insurance company, fraternal benefit society, or beneficial society, or order, without having first obtained the written approval of the Insurance Commissioner; or (e) is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policyholders, or to its creditors, or to the public; or (f) has wilfully violated its charter or any law of the Commonwealth; or (g) whenever any officer thereof has refused to be examined under oath touching its affairs; or (h) was incorporated, organized, or is operating without authority of law, the Insurance Commissioner shall communicate the facts to the Attorney General, who shall, after hearing, apply to the court of common pleas of Dauphin County, or to the court of any county in which the principal office of such company, association, exchange, title insurance company, fraternal benefit society, or beneficial society, or order is located, for an order directing such company, association, exchange, title insurance company, fraternal benefit society, or beneficial society, or order to show cause why its business should not be closed, and the Insurance Commissioner should not take possession of its property and conduct its business, and for such other relief as the nature of the case the interests of its policyholders, creditors, stockholders, or the public may require."

"Section 503 (40 P. S. S. 203). NONPAYMENT OF JUDGMENTS BY MUTUAL COMPANIES; ASSESSMENT OF POLICYHOLDERS; DISSOLUTION.—Whenever proof shall be submitted to the Insurance Commissioner showing that any execution against any mutual insurance company of this State, in pursuance of judgment obtained against said company in any court of record of this Commonwealth, has been returned nulla bona by the sheriff of the county in which said company is located, it shall be his duty to notify the Attorney General, who thereupon shall apply to the court of common pleas of Dauphin County, or to a judge thereof in vacation, for an order upon such company to show cause why its

business should not be closed. Upon the hearing of such rule or order, the court or judge aforesaid shall direct the officers of said company to assess and collect from the policyholders thereof a sum sufficient to satisfy said judgment and execution and all other claims against said company, or to make any other order or orders in the premises as may appear to said court or judge just and necessary. In case it shall finally appear to said court or judge that the company aforesaid cannot collect from its members sufficient funds to satisfy the claims against it, the said company shall be adjudged insolvent, and the court or judge aforesaid shall decree its dissolution, and appoint the Insurance Commissioner as receiver to take charge of its effects with like powers as hereinafter provided."

"Section 504 (40 P. S. Sec. 204). SERVICE OF PROCESS.—The order to show cause, and the papers upon which the same is made in any proceeding instituted under the provisions of this act, shall be served upon the company, association, exchange, society, or order named in such order in the manner prescribed for personal service of summons upon a domestic corporation by the laws of this Commonwealth. When it is satisfactorily proved by affidavit that the officers of the company, association, exchange, society, or order named in the said order to show cause, upon whom service is required to be made as above provided, shall have departed from the State, or keep themselves concealed therein with intent to avoid service, such order to show cause may provide for service thereof in manner as the court or judge by whom the same is made shall direct."

"Section 505 (40 P. S. Sec. 205). INJUNCTION; RETURN OF ORDER TO SHOW CAUSE AND DECREES THEREON.—On such application, or at any time thereafter, such court may, in its discretion, issue an injunction restraining such company, association, exchange, society, or order from the transaction of its business or disposition of its property until the further order of the court. On the return of such order to show cause, and after a full hearing before the court or before an examiner appointed by the court, the court shall either deny the application or direct the Insurance Commissioner forthwith to take possession of the property and conduct the business of such company, asso-

ciation, exchange, society, or order, and retain such possession and conduct such business until, on the application either of the commissioner, through the Attorney General, or of such company, association, exchange, society, or order, it shall, after a like hearing, appear to the court that the ground for such order directing the Insurance Commissioner to take possession has been removed, and that the company, association, exchange, society, or order can properly resume possession of its property and the conduct of its business."

"Section 506 (40 P. S. Sec. 206). (As amended by the Act of June 12, 1951, P. L. 515.) ORDERS FOR LIQUIDATION OF AFFAIRS OF COMPANIES, ET CETERA; INSURANCE COMMISSIONER TO ACT AS RECEIVER.—If on a like application and order to show cause, and after a full hearing, the court shall order the liquidation of the business of such company, association, exchange, society, or order, such liquidation shall be made by and under the direction of the Insurance Commissioner, who shall be vested by operation of law with title of all of the property, contracts, and rights of action of such company, association, exchange, society, or order as of the date of the order so directing him to liquidate. The filing or recording of such order in any record office of the State shall impart the same notice that a deed, bill of sale, or other evidence of title, duly filed or recorded by such company, association, exchange, society, or order, would have imparted. The order of liquidation shall, unless otherwise directed by the court, provide that the dissolution of the company, association, exchange, society, or order shall take effect upon the entry of such order in the office of the clerk of the county wherein such company, association, exchange, society, or order had its principal office for the transaction of business. Within thirty days after the taking effect of an order of liquidation of any stock or mutual fire insurance company, association or exchange, the Insurance Commissioner shall mail a notice thereof to each of its policyholders or members."

"Section 507 (40 P. S. Sec. 207). INSURANCE COMMISSIONER TO SUPERSEDE OTHER RECEIVERS—Whenever a receiver of an insurance company, association, exchange,

society, or order is appointed by any court of this Commonwealth, on motion of the Attorney General at the instance of the Insurance Commissioner, such receiver shall forthwith supersede any receiver previously appointed by the decree of any court of this Commonwealth, and shall likewise supersede any assignee or trustee previously appointed by such insurance company, association, exchange, society, or order."

(192)

COPY

AUG 3 1953
HAROLD B. WILLEY, Cle

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 229

KEYSTONE MUTUAL POLICYHOLDERS' COMMITTEE,
Appellants

vs.

COMMONWEALTH OF PENNSYLVANIA;
WILLIAM GOLDSTEIN, ET AL;
KURT HITKE AND COMPANY, ET AL;
CLAUDE B. HANLEY, ANCILLARY RECEIVER
OF THE STATE OF MARYLAND
Appellees

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

ELLIS G. ARNALL
CLEBURNE E. GREGORY, JR.
ARNALL, GOLDEN AND GREGORY
First National Bank Bldg.
Atlanta, Georgia

WALTER M. NEWMAN
WALKER AND NEWMAN
Jones Law Bldg.
Pittsburgh, Pennsylvania

Attorneys for Appellants

INDEX

Subject Index

	Page
Brief Opposing Motion to Dismiss Appeal	1
I. Summary of Relevant Facts	1
II. Does Appeal Lie as the Method of Review?	7
III. Does the Court Have Jurisdiction to Review Either by Way of Appeal or Certiorari?	14
(1) The Decree of Dissolution Was Not Appealed	14
(2) Was the Federal Question Properly Raised and Preserved in the State Courts?	15
(3) Is There a Present Case or Controversy?	16
(4) Is a Substantial Federal Question Presented?	17
(5) Does the Decision Rest Upon Non-Federal Grounds which Independently Support the Judgment?	21
IV. Conclusion	26

Table of Cases

Abie State Bank v. *Bryan*, 282 U.S. 765, 51 S. Ct. 262, 75 L. ed. 690	23
Allen v. *Southern Pacific Railroad Company*, 173 U.S. 479, 19 S. Ct. 518, 43 L. ed. 775	24
Anderson National Bank v. *Luckett*, 321 U.S. 233 64 S. Ct. 599, 88 L. ed. 692	10
Armour Transportation Company v. *Pennsylvania Public Utility Commission*, 138 Pa. Super. Ct. 243, 249	9
Ballard v. *Hunter*, 204 U.S. 241 27 S. Ct. 261, 51 L. ed. 461	10
Carlson v. *Washington*, 234 U.S. 103, 34 S. Ct. 717, 58 L. ed. 1237	8
Chambers v. *Baltimore & Ohio Railroad Company*, 207 U.S. 142, 28 S. Ct. 34, 52 L. ed. 143	8
Coe v. *Armour Fertilizer Works*, 237 U.S. 314, 35 S. Ct. 625, 59 L. ed. 1027	24
Commonwealth ex rel Chidsey v. *Keystone Mutual Casualty Co.*, 366 Pa. 149	13, 16

Page

Consolidated Turnpike Company, et al, v. *Norfolk & Ocean View Railway Company,* 228 U.S. 596, 33 S. Ct. 510, 57 L. ed. 982 13

DeJonge v. *Oregon,* 229 U.S. 353, 57 S. Ct. 255, 81 L. ed. 278 16

Dohany v. *Rogers,* 281 U.S. 362 50 S. Ct. 299, 74 L. ed. 904 10

Enterprise *Irrigation District* v. *Farmers Mutual Canal Company,* 243 U.S. 157, 37 S. Ct. 318, 61 L. ed. 644 ..... 22, 23

Gelpcke v. *The City of Dubuque,* 68 U.S. (1 Wall) 175, 17 L. ed. 520 26

Hansberry v. *Lee,* 311 U.S. 32, 61 S. Ct. 115, 85 L. ed. 22 13

Lancaster and Mintzer's Appeal, 111 Pa. 524 17

Live Oak Water Users' Ass'n. v. *Railway Commission of California,* 269 U.S. 354, 46 S. Ct. 149, 70 L. ed. 305 11

Mallinckrodt Chemical Works v. *Missouri, ex rel Jones,* 238 U.S. 41, 35 S. Ct. 671, 59 L. ed. 1192 8

Manhattan Life Insurance Company of New York v. *Cohen,* 234 U.S. 123, 34 S. Ct. 874, 58 L. ed. 1245 9

Memphis Natural Gas Company v. *Beeler,* 315 U.S. 649, 62 S. Ct. 857, 86 L. ed. 1090 11

Miedreich v. *Lowenstein,* 232 U.S. 236, 34 S. Ct. 309, 58 L. ed. 584 8

Montana ex rel Haire v. *Rice,* 204 U.S. 291, 27 S. Ct. 281, 51 L. ed. 490 8

Montgomery County Bar Ass'n. v. *Rinalducci,* 329 Pa. 296 9

National Auto Corp. v. *Barfod,* 289 Pa. 307 ..... 14, 21

New York ex rel Bryant v. *Zimmerman,* 278 U.S. 63, 49 S. Ct. 61, 73 L. ed. 184 ..... 10, 11

North Carolina Railroad Company v. *Zachary,* 232 U.S. 248, 34 S. Ct. 305, 58 L. ed. 591 8

O'Neill v. *Leamer,* 239 U.S. 244, 36 S. Ct. 54, 60 L. ed. 249 13

Page

Penn. General Casualty Co. v. *Commonwealth of Pennsylvania*, 294 U.S. 189, 55 S. Ct. 186, 79 L. ed. 850 19
Postal Telegraph-Cable Company v. *City of Newport*, 247 U.S. 464, 38 S. Ct. 566, 62 L. ed. 1215 ..... 22, 23
Rose v. *Turnpike Co.* (Pa.) 3 Watts 46 14
St. Louis, Iron Mountain & Southern Railway Company v. *Hesterly*, 228 U.S. 702, 33 S. Ct. 703, 57 L. ed. 1031 8
Standard Oil Company of California v. *Johnson*, 316 U.S. 481, 62 S. Ct. 1168, 86 L. ed. 1611 25
Texas & Pacific Railway Company v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 27 S. Ct. 350, 51 L. ed. 553 15
Union Trust Co. of Pittsburgh Case, 359 Pa. 363 10
Ward & Gow v. *Klinsky*, 259 U.S. 503, 42 S. Ct. 529, 66 L. ed. 1033 25

FEDERAL STATUTES CITED

Act of June 25, 1948, C. 646, 62 Stat. 929, 28 U.S.C. 1257 (2) 10, 12
Act of June 25, 1948, c. 646, 62 Stat. 962, 28 U. S. C. 2103 13

PENNSYLVANIA STATUTES CITED

Sec. 213, Pennsylvania Insurance Department Act of May 17, 1921, as amended, P. L. 789 (40 P. S. 51) 3, 20, 21, 26
Sec. 321, Pennsylvania Insurance Department Act of May 17, 1921, P. L. 789 (40 P. S. 131) 4, 20, 21, 26
Sec. 502, Pennsylvania Insurance Department Act of May 17, 1921, as amended, P. L. 789 (40 P. S. 202) 5, 17, 18, 19, 20, 21
Sec. 505, Pennsylvania Insurance Department Act of May 17, 1921, as amended, P. L. 789 (40 P. S. 205) 5, 17, 18, 19, 20
Sec. 506, Pennsylvania Insurance Department Act of May 17, 1921, as amended, P. L. 789 (40 P. S. 206) 16, 17, 18, 19, 20, 26

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No.

KEYSTONE MUTUAL POLICYHOLDERS' COMMITTEE

Appellants

vs.

COMMONWEALTH OF PENNSYLVANIA;
WILLIAM GOLDSTEIN, ET AL;
KURT HITKE AND COMPANY, ET AL;
CLAUDE B. HANLEY, ANCILLARY RECEIVER
OF THE STATE OF MARYLAND,

Appellees

BRIEF OPPOSING MOTION TO DISMISS APPEAL

The purpose of this brief, filed in compliance with the permission granted by Rule 7(3) of the Supreme Court of the United States is to oppose the motion filed by the Goldstein Committee, one of the appellees in the above matter, to dismiss the appeal on jurisdictional grounds. Accordingly, for the convenience of the Court, the component parts of the brief will be numbered to correspond with those parts of the motion which they undertake to answer.

I. Summary of Relevant Facts

The facts have been set out in some detail in appellants' Statement of Jurisdiction. However, the "Summary of Relevant Facts" in the Motion to Dismiss contains a number of conclu-

sions which are either unsupported or qualified by the facts appearing in the record, and which should be mentioned.

The decree of June 26, 1947, established that the company was insolvent and that its further transaction of business would be hazardous to its policyholders, its creditors and to the public as appellees assert, only if the decree was valid. The decree was not valid if appellants were deprived of rights guaranteed to them by the Federal Constitution. That is the very issue now before the Court. Thus the appellees introduce their motion by assuming the ultimate conclusion now in dispute.

The nature of the "audit" and of the "admissions" by the officers who had falsified the annual statement of the company, and accordingly stood to gain by co-operating with the Commissioner, one of whom had already asked the Commissioner not to prosecute his wife who was the treasurer of the company (R. 817a, 818a) have been set out in some detail in appellants' Statement of Jurisdiction.

The inability of the company to raise funds necessary to put it in a solvent condition was due both to the failure of the Commissioner to give it notice of the amount required (R. 896a) and to the failure to give it the statutory time to make good the impairment to its reserves. (R. 231a, 238a). Thus, the acknowledgment of the Secretary and managing head of the company referred to by appellees was as follows:

> "After the telegram was sent out from Atlantic City, Mr. Kann reported to me that they were unable to raise any money over the period, that the thing had gone on." (R. 825a)

The period referred to was from the first meeting between Kann and the Commissioner which occurred a few days after the examination had commenced (R. 814a) on May 21, 1947 (R. 885a) until the telegram was sent out from Atlantic City on June 4, 1947 instructing the company not to write any new or

renewable non-assessable policies. (R. 823a) The statement by counsel for the company at the hearing on June 25, 1947 was as follows:

> "* * * Now, when this situation arose the Company was confronted with a practical question to try to raise money to meet the department's requirements. A sincere effort and a more than sincere effort has been made in that direction but unfortunately we are told that prospective lenders, prospective companies who would be interested would need at least sixty days before they could decide whether or not they would take this company over. As late as six o'clock last evening I was in touch with the Vice-President of a company. This company is owned by one of the largest merchandising companies in the world. I talked to the Vice-President personally. He expressed a deep interest and I impressed on him that this action was to be taken this morning, at this time. He said 'Well then, can you get the Insurance Commissioner if we are interested, to defer this hearing?' I said 'I am afraid not,' but I said 'If you will give us a commitment, I believe that the Insurance Commissioner will make, as he has made, an honest and sincere effort to try to save this Company for the benefit of the stockholders, of the creditors and of the public. I called him back four hours later. I talked to his secretary and the secretary said, 'Mr. Reich, I have just sent you a wire, "No interest due to lack of time." ' I feel that some group is going to save this company. It is worthwhile saving." (R. 1770a)

Section 213 of the Pennsylvania Insurance Department Act of May 17, 1921, as amended, P.L. 789 (40 P.S. 51) requires the Insurance Commissioner to grant a hearing to the company examined before filing a report of examination. Such a hearing would have put the company on notice of the amount and basis of the deficit claimed and of the charges. However the company did not see the report of examination until the hearing on June 25, 1947. (R. 1765a)

Section 321 of the same act P.L. 789 (40 P.S. 131), provides that the Commissioner shall, in case he finds the capital or reserve of the company impaired 20%, give notice to the company to make good the capital or reserve within sixty days. That notice or time was never given (R. 231a, 238a).

The deficiencies of the notice of the hearing on June 25, 1947, based upon conclusions drawn from a report of examination which was not prepared in compliance with statutory requirements and which was never furnished to the company before the hearing, have been pointed out in the appellants' Statement of Jurisdiction.

The resolution of the directors again emphasized that the inability of the company to raise the money necessary to bring the reserves of the company up to the amount required by the Commissioner was due to the lack of time afforded. It recited:

> "Whereas, the Company has been advised that the reserves of the Company do not meet the legal requirements of the Insurance Department of the Commonwealth of Pennsylvania; and
>
> "Whereas, the Company has made many efforts to raise sufficient moneys to bring the reserves up to the legal requirements; and
>
> "Whereas, the Company has been unable since it was notified that its reserves were inadequate to raise the additional moneys necessary to bring the reserves of the Company up to the legal requirements; and
>
> "Whereas, the Company has been ordered not to do business except the right to collect premiums and cancel policies; * * *" (R. 1761a, 1762a).

The resolution requested the Insurance Commissioner to immediately take charge of the affairs of the Company "in order to conserve the assets of the Company for the benefit of all concerned" and the resignations of the officers and directors were accepted "in order to facilitate any action of any person or com-

pany to purchase or rehabilitate the Company." At that time the only notice which had been given was of the hearing under Section 502. The liquidation of the company had never been suggested.

The company had no officers after June 24, 1947 except Mr. O'Neill, a Vice-President. (R. 1779a-1786a) The authority of the attorney for the company who appeared at the hearing on June 25, 1947, was limited by the resolution of the directors adopted on June 24th. The resolution was in evidence. (R. 1761a) This authority would have sufficed if the hearing had followed the notice as a Section 502 custodial hearing. The appearance, waiver of notice and of issuance of the rule, acceptance of service and consent to the granting of the relief prayed was also specifically so limited to possession by the Commissioner for the purposes of sale or rehabilitation; that is, to possession under the provisions of Section 505 of the Act. (R. 1839a) This was recognized by the Court to which the decree of liquidation was presented, the decree reciting only that:

> "* * * prior to the issuance of the said Rule the said Keystone Mutual Casualty Company, appeared by its attorney, waived the issuance of the Rule, accepted service of the same, *and consented to possession of the company by the Insurance Commissioner* * * *"

(Emphasis added). (R. 1951a)

Also, the Deputy Attorney General who represented the Insurance Department at the hearing testified:

> "Q. You will agree with me there is nothing in that resolution that authorized the liquidation of the company, is there?
>
> * * *
>
> The Witness:
>
> No, Mr. Reich said the farthest he can agree is to go along on having the Insurance Commissioner take over, because that is what the resolution says, 'and that is what my au-

thority is.' I said, 'Can we agree to this decree we have drawn up?' Then in answer, 'First I can't agree to the decree; the best we can do is accept service and agree to the terms of the resolution that was given by my authority.'

* * *

Q. Did Joseph Reich or any representative of the company either urge or agree that this company be liquidated?

* * *

The Witness:

They did not, quite to the contrary, they were insistent they could get more money. Particularly Reich, he was insistent he could get more money and put himself and the Company in good shape and he said he had been trying to do that for a considerable period of time. He had no authority to agree to anything other than the Insurance Commissioner to take over, and hold until such time as he could accomplish that purpose.* * *" (R. 299a, 303a)

Thus, the attorney for the company did not join in the prayer of the Suggestion of the Attorney General for the liquidation of the company, as stated in the Motion to Dismiss; and, in any event, he had no authority to do so, which was well known both to the Court and to counsel for the Insurance Department.

The statement in the Motion to Dismiss regarding the turning over of assets by other states to the Pennsylvania insurance Commissioner, the settlement of claims, waiver of rights and abandonment of claims is not supported by any factual record references, the reference there being to the argument in the opinion of the Court of Common Pleas in support of its judgment which, itself, does not lend support, except inferentially, to such statements.

The statement in the Motion to Dismiss that "*No appeal was ever taken from the entry of this final decree,*" if it has any significance, again presupposes a valid decree of which appellants had prior notice and an adequate opportunity to resist. They

had neither. The decree was attacked by the intervention of the Matlack Committee on June 2, 1948. It has been under attack ever since. The complaint of lack of notice and opportunity to be heard was not first raised on the appeal to the Supreme Court of Pennsylvania, as stated in the Motion to Dismiss, but was raised before the Court of Common Pleas and was discussed and decided by that Court in its opinion filed March 17, 1952. (R. 1735a-1739a) Neither was it necessary to elicit testimony at the hearing from the officers and directors regarding the lack of adequate notice and of opportunity to be heard. As pointed out in appellants' Statement of Jurisdiction, it was completely and thoroughly shown by the evidence.

II. Does Appeal Lie as the Method of Review?

Much of this section of the Motion to Dismiss is devoted to an effort to establish that the petition to vacate the decree of June 26, 1947, did not raise the Federal question; that under the law of Pennsylvania the issue was determined by the pleadings; and that matters not properly raised in the Court below cannot be invoked on appeal, notwithstanding that they involve constitutional questions. Appellees argument would have some merit if the Supreme Court of Pennsylvania (as did the Court of Common Pleas) had not considered the Federal question to be properly before the Court and decided it against the appellants. It said:

> "The appellant intervenors contend that the decree of June 26, 1947, was void * * * (2) because it was entered without the required notice or hearing * * *"

Again:

> "In order to determine whether the decree of the court below dated June 26, 1947, was valid, it is necessary first to consider (1) the provisions and requirements of the Insurance Code of May 17, 1921, and (2) the constitutional requirement of due process, i.e., notice of a hearing and an opportunity to be heard. These are so closely related

that they will be considered together."

Again:

"* * * The reason why this issue was never previously raised must be obvious; there was adequate notice and ample opportunity to be heard in June 1947 and consequently there was no failure of due process."

And again:

"In the light of all these unusual and indisputable facts, it would strain our credulity to believe and it would be stretching the technicalities of the law far beyond reason for us to hold that the officers and directors of this company did not have adequate notice of the hearing, or that they did not waive the technical requirements of the Insurance Code, or that the Court did not have the right to authorize and direct the Insurance Commissioner to take possession of the Company for the purpose of liquidating it."

Where it appears from the opinion of the State Supreme Court that the Federal question was treated as being sufficiently raised, and was specifically dealt with and ruled against the plaintiff in error, and was necessary to its decision, this is sufficient to confer jurisdiction upon the Supreme Court of the United States.

Mallinckrodt Chemical Works v. *Missouri, ex rel Jones*, 238 U. S. 41, 49, 35 S. Ct. 671, 59 L. ed. 1192.

North Carolina Railroad Company v. *Zachary*, 232 U.S. 248, 257, 34 S. Ct. 305, 58 L. ed. 591.

Miedreich v. *Lowenstein*, 232 U.S. 236, 242, 34 S. Ct. 309, 58 L. ed. 584.

Carlson v. *Washington*, 234 U.S. 103, 105, 106, 34 S. Ct. 717, 58 L. ed. 1237.

St. Louis, Iron Mountain & Southern Railway Company v. *Hesterly*, 228 U.S. 702, 704, 33 S. Ct. 703, 57 L. ed. 1031.

Montana ex rel Haire v. *Rice*, 204 U.S. 291, 298, 299, 27 S. Ct. 281, 51 L. ed. 490.

Chambers v. *Baltimore & Ohio Railroad Company*, 207 U.S. 142, 148, 28 S. Ct. 34, 52 L. ed. 143.

This would be true even though there were nothing in the present record to show that the Federal question was raised in the court below. When it appears that the Federal question was actually considered and decided by the State Supreme Court it is irrelevant to inquire how and when it was raised in a court below.

> *Manhattan Life Insurance Company of New York* v. *Cohen*, 234 U.S. 123, 134, 34 S. Ct. 874, 58 L. ed. 1245.

Although not here significant, it is interesting to observe that in one of the cases cited by appellees as authority to the contrary, the Supreme Court of Pennsylvania has passed upon important constitutional questions which were not raised in the court below.

> *Montgomery County Bar Ass'n.* v. *Rinalducci*, 329 Pa. 296.

Appellees next contend in their Motion to Dismiss that question number 5 in appellant's statement of the questions to be argued on appeal in the Supreme Court of Pennsylvania, and the opinion of the Supreme Court of that State make no specific reference to the due process clause of the Federal Constitution, as distinguished from the due process clause of the State Constitution.

The opinion of the Court of Common Pleas shows clearly that the attack was launched under the due process provisions of both Federal and State Constitutions. Thus, it said:

> "The Commonwealth has advanced the contention that this company was cavalierly interred because certain administrative deficiencies constituted a lack of procedural due process, as required by our Federal and State Constitutions, and further because the entry of our decree of June 26, 1947 deprived the company and its member policyholders of their property without due process of law, since it was entered without compliance with the requisite statutory requirements in the matter of notice and hearing: Armour Transportation Company v. Pennsylvania Public Utility Commission, 138 Pa. Super. Ct. 243, 249 (1939)." (R. 1735a)

The appellants, in their printed brief on appeal to the Supreme Court of Pennsylvania again made reference in the argument to the due process provisions of both the State and Federal Constitutions. (Brief, pp. 37-49; R.)

The Supreme Court of Pennsylvania understood that the challenge was under the due process provisions of both the Federal and State Constitutions, and so decided it. It said:

> "The fundamental requirements of due process in a proceeding affecting property interests are (1) a notice of proceedings appropriate to the nature of the case and adequate to safeguard the rights of the parties, and (2) an opportunity to be heard. *Anderson National Bank* v. *Luckett*, 321 U.S 233; *Dohaney* v. *Rogers*, 281 U.S. 362; *Ballard* v. *Hunter*, 204 U.S. 241; *Union Trust Co. of Pittsburgh Case*, 359 Pa. 363." (R.)

The three cases first cited set out the requirements of due process under the 14th Amendment to the Constitution of the United States; the last cited case sets out the requirements under the similar provision of the State Constitution.

In the case of *New York ex rel Bryant* v. *Zimmerman*, 278 U.S. 63, 68, 69, 49 S. Ct. 61, 73 L. ed. 184, under very similar facts, this Court looked to the opinion of the intermediate appellate court, the printed briefs there, and the authority cited by the highest appellate court of the State, from which the appeal was taken, in order to determine that the challenge was under the 14th Amendment to the Federal Constitution.

Appellees next contend in the Motion to Dismiss that the Supreme Court of Pennsylvania was never asked to, and did not, pass on the validity of the state statute, which is necessary to give this Court jurisdiction on appeal under the provisions of 28 U.S.C. 1257(2).

Although question number five of appellants' statement of the questions to be argued on appeal in the Supreme Court of Penn-

sylvania did not specifically assert the invalidity of the statute as construed or applied, in attacking the decree as depriving the company and its policyholders of property without due process of law, it, of course, was predicated upon the challenge that either the statute was violated or, if not, as had been held by the Court of Common Pleas, the statute as so construed and applied to permit the decree was invalid. Reference to appellants' printed brief in the Supreme Court of Pennsylvania confirms this as the argument. Thus, in the "Statement of Questions Involved" the question was stated in the alternative, as follows:

> "1. Was the entry of the decree of liquidation and forfeiture a violation of the applicable statutes or a denial of due process of law? (Denied)"

(Brief p. 1, R.)

The only logical interpretation of that question is that if the decree did not violate the statutes, the statutes as construed and applied violated due process. As acknowledged in appellees' Motion to Dismiss (p. 6) the brief also makes reference to the particular sections of the Insurance Department Act drawn in question (Brief pp. 37-49, R.) It is proper to refer to the briefs in a state supreme court, which have been certified as a part of the record, where assignments of error are not used, in order to interpret the question which was decided by that court.

> *New York ex rel Bryant* v. *Zimmerman*, 278 U.S. 63, 68, 69, 49 S. Ct. 61, 73 L. ed. 184.

It would not be proper, as held in *Live Oak Water Users Ass'n.* v. *Railroad Commission of California*, 269 U.S. 354, 357-358, 46 S. Ct. 149, 70 L. ed. 305, cited by appellees, and in *Memphis Natural Gas Company* v. *Beeler*, 315 U.S. 649, 651, 62 S. Ct. 857, 86 L. Ed. 1090, if the state supreme court had not passed on the Federal question and there was no showing that the question could be properly raised under the state court practice in that manner.

The opinion of the Pennsylvania Supreme Court leaves no doubt that it construed the statute and considered and passed upon the validity of the statute as so construed and applied to the company under the facts shown by the evidence. It examined the pertinent statutory requirements of notice and hearing to see whether they complied with due process. Thus it said:

> "In order to determine whether the decree of the court below dated June 26, 1947, was valid, it is necessary first to consider (1) the provisions and requirements of the Insurance Code of May 17, 1921, and (2) the constitutional requirement of due process, i. e., notice of a hearing and an opportunity to be heard. These are so closely related that they will be considered together." (R.)

It then noted the requirements of Sections 502 and 506 of the statute relating to notice and hearing and set out the fundamental requirements of due process in a proceeding affecting property interests. It did not note any defect in the statutory requirements. However, dealing specifically with the statutory requirements of an order to show cause and of a full hearing, the Court construed them to be "technical requirements" which had been complied with by the giving of "adequate notice of the hearing" to the officers and directors of the company, or which had been waived by the officers and directors; so that the court had the right to authorize and direct the Insurance Commissioner to take possession of the company for the purpose of liquidating it. The Court specifically held that "* * * there was adequate notice and ample opportunity to be heard in June 1947 and consequently there was no failure of due process." In thus holding that the officers and directors of the company had adequate notice of the hearing and ample opportunity to be heard, and that there was no violation of the statute or failure of due process, the Court necessarily sustained the validity of the statute as so construed and applied, which meets the jurisdictional requirements for an appeal under the provisions of 28 U.S.C. 1257(2). See the cases cited in appellants' Statement of Jurisdiction. The

inadequacy of the "waiver" both factually and legally as a non-Federal ground which will support the judgment has also been discussed there.

In the final analysis, even if the question raised and answered had been only that rights, privileges or immunities guaranteed to appellants under the due process provision of the 14th Amendment to the Federal Constitution were violated, and the question had not reached the validity of the statute as construed or applied, this alone would not be ground for dismissal. Act of June 25, 1948, c. 646, 62 Stat. 962, 28 U.S.C. 2103. Under the provisions of that statute, the papers whereon the appeal was taken would be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken.

Where the facts show, as they do here, that petitioner's property was taken by a plain and substantial departure by the Commonwealth from the fundamental rights so guaranteed by the 14th Amendment to the Federal Constitution, a Federal question of serious import is presented.

> *Consolidated Turnpike Company, et al.*, v. *Norfolk & Ocean View Railway Company*, 228 U.S. 596, 599, 33 S. Ct. 510, 57 L. ed. 982, 983.
>
> *Hansberry* v. *Lee*, 311 U.S. 32, 40, 61 S. Ct. 115, 85 L. ed. 22, 26.
>
> *O'Neill* v. *Leamer*, 239 U.S. 244, 249, 36 S. Ct. 54, 60 L. ed. 249, 264.

The forfeiture of the charter and the liquidation of the mutual insurance company is not only a matter of utmost concern to the Commonwealth, to the 26 states in which it has been conducting business, to the assureds (of whom there are approximately 105,000) who, as its members, are interested both in its assets and their possible assessment liability (*Commonwealth ex rel Chidsey* v. *Keystone Mutual Casualty Co.*, 366 Pa. 149, 152;

Rose v. *Turnpike Co.* (pa) 3 Watts 46, 48) and to its creditors, but the decision has resulted in an apparent and unexplained conflict in the decisions of the Supreme Court of Pennsylvania regarding the necessity of compliance by the Commonwealth with the notice and hearing provisions of the statute. In *National Auto Corp.* v. *Barfod*, 289 Pa. 307, such provisions were held essential to the validity of a statute under the 14th Amendment to the Federal Constitution. In this case they were held to be "technical requirements" which were either complied with or which did not have to be complied with under the facts shown by the evidence. This Court would not be expected to resolve that conflict by construing the Pennsylvania Statute, but it can, and should, insure the stability of the rights guaranteed by the 14th Amendment to the Federal Constitution against such vacillation of a state court; especially when it involves a statute of frequent application and of large public importance.

III. Does the Court Have Jurisdiction to Review Either by Way of Appeal or Certiorari?

(1) The Decree of Dissolution Was Not Appealed.

The contention made in the Motion to Dismiss that the original decree of June 26, 1947 was a final order and decree from which no appeal was taken and, accordingly, appellants can expect nothing more than that some consideration be given to the allegation of lack of due process as one of a number of other factors to influence the exercise of the equitable powers of the court, is a question of state practice which has been precluded by the decision of the Supreme Court of Pennsylvania. That Court considered and decided the Federal question, not as an additional reason for inducing the exercise of equitable powers, but as going to the validity of the decree. It said:

> "In order to determine whether the decree of the court below dated June 26, 1947, was valid, it is necessary first to consider (1) the provisions and requirements of the Insur-

> ance Code of May 17, 1921, and (2) the constitutional requirement of due process, i.e., notice of a hearing and an opportunity to be heard." (R.)

As heretofore shown, the decision of the Pennsylvania Supreme Court is sufficient to confer jurisdiction upon the Supreme Court of the United States. It is worthy of comment, however, that it was the very failure to give adequate notice and a full hearing, now complained of, which prevented appellants or anyone in their behalf from appealing the decree of June 26, 1947 within the period of three months permitted by Pennsylvania practice.

(2) Was the Federal Question Properly Raised and Preserved in the State Courts?

The issues raised in this section of the Motion to Dismiss have been discussed in an earlier portion of this brief. Decisions of this Court were cited which hold that where the federal question is considered and decided adversely to the plaintiff in error by the Supreme Court of a State, and is necessary to its decision, that is sufficient to give jurisdiction to the Supreme Court of the United States and it is irrelevant to inquire how and when it was raised in the court below. Those decisions also dispose of the efforts of appellees to interpret statements made by counsel and the judge in the trial court as limiting the issues which may now be considered by this Court. It is significant to observe, however, that the Court of Common Pleas itself did not consider the question so limited and considered and denied the objections raised under the due process provisions of the Federal and State Constitutions. (R. 1735a-1739a)

The case of *Texas & Pacific Railway Company* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 434-435, 27 S. Ct. 350, 51 L. ed. 553, cited by appellees is one in which the highest appellate court of a state, to which the writ of error was directed, in deciding the case had expressly declared that the course of the argument and briefs of counsel before it confined the case to a

single issue. *DeJonge* v. *Oregon*, 229 U.S. 353, 358, 57 S. Ct. 255, 81 L. ed. 278 was a case in which there was a stipulation of facts filed in the State Supreme Court after appeal to the Supreme Court of the United States had been allowed.

The sufficiency of the Federal question which was raised by appellants, and considered and decided by the Supreme Court of Pennsylvania, to give this Court jurisdiction on appeal has already been discussed.

Appellees contention that the intervention by the Matlack Committee and that of appellants was not timely has been considered and decided adversely to appellees by the Pennsylvania Supreme Court.

> *Comm. ex rel Chidsey* v. *Keystone Mutual Casualty Co.*, 366 Pa. 149.

(3) Is There a Present Case or Controversy?

In this section of their Motion to Dismiss appellees again advance an argument which should have been advanced in the State courts. They cite no facts which were not before the Supreme Court of Pennsylvania and that Court did not refuse to consider the appeal nor did it predicate its decision upon the basis that the question was moot. Appellees' argument here again assumes the validity of the decree of June 26, 1947, and further assumes that the burden of proving the solvency of the Company on the petition to vacate the decree was properly cast. If so much of the decree as provided for the dissolution of the company, the vacation of its charter, and the liquidation of its affairs was void, as is here contended, because entered without the notice and hearing required by due process, the burden of proof would be on the Commonwealth if a liquidation proceeding were brought under Section 506 of the Pennsylvania Insurance Department Act. In

Lancaster and Mintzer's Appeal, 111 Pa. 524, 533

the Supreme Court of Pennsylvania, in reversing a refusal to vacate a decree which had been entered without due notice, rejected the theory of the Court below which placed upon the petitioner the burden of disproving the facts which the decree sought to adjudicate. It said:

> "Where an order, decree, or judgment has been wrongfully entered without notice to a party who was entitled to notice, such party may demand its vacation, at least to the extent that it affects his interest. His right is that he be heard before the judge or court decides, not that there may be an ex parte hearing and adjudication, after which he may, if he can, show that the adjudication unjustly affects him."

The "doubts" the Insurance Commissioner who initiated the petition to vacate the decree on the theory of solvency of the company expressed to the Supreme Court of Pennsylvania in his answer to a petition for supersedeas that a rehabilitation of the company could now be consummated contradicts both his petition and his brief in the Court of Common Pleas and cannot constitute the basis for a decision on the question of rehabilitation which was not involved in the case and concerning which the company is entitled to a hearing upon application duly made under the statute. Section 505, Pennsylvania Insurance Department Act of May 17, 1921, as amended, 40 P.S. 205.

(4) Is a Substantial Federal Question Presented?

Appellees correctly state in this section of their Motion to Dismiss that Sections 502 through 506 of the Pennsylvania Insurance Department Act of May 17, 1921, are related steps of an integral whole governing the manner of handling an insurance company when its business can no longer be conducted safely with due regard for the public interest. Appellants' contentions, however, do not depend upon a "strained construction," but are based upon the unadorned language of the statute.

Section 502 provides that whenever an insurance company is insolvent or in any other specified manner or for any other specified reason has become unstable or unsound

> "* * * the Insurance Commissioner shall communicate the facts to the Attorney General, who shall, after hearing apply to the court of common pleas of Dauphin County * * * for an order directing such company * * * to show cause why its business should not be closed, and the Insurance Commissioner should not take possession of its property and conduct its business, and for such other relief as the nature of the case and the interests of its policyholders, creditors, stockholders, or the public may require."

Section 504 provides the manner of giving notice.

Section 505 provides with respect to a show cause order, that

> "On the return of such order to show cause, and after full hearing before the court * * * the court shall either deny the application or direct the Insurance Commissioner forthwith to take possession of the property and conduct the business of such company * * * and retain such possession and conduct such business until, on the application either of the commissioner, through the Attorney General, or of such company * * * it shall after a like hearing, appear to the court that the ground for such order directing the Insurance Commissioner to take possession has been removed, and that the company * * * can properly resume possession of its property and the conduct of its business."

Section 506 provides that

> "If on a like application and order to show cause, and after a full hearing, the court shall order the liquidation of the business of such company * * * such liquidation shall be made by and under the direction of the Insurance Commissioner * * *"

Several conclusions are irresistible from a mere reading of the statute.

There must be a hearing before application by the Attorney

BLEED. THROUGH POOR COPY

General to the Court, regardless of the relief requested which, of course, should be consistent with the nature of the facts established at the hearing.

There must be a "full hearing" on the rule to show cause why a possession order should not issue.

After possession is taken, if the Insurance Commissioner is not to engage in the permanent operation of the business, two outcomes are possible. The company may be rehabilitated under the provisions of Section 505 or it may be liquidated under the provisions of Section 506. In either event an application and hearing is required. Section 506 specifies an order to show cause and a full hearing before an order of liquidation.

The rules to show cause required by the separate sections 505 and 506 of the Act must give notice of the objectives set forth in their respective sections.

If "such other relief" referred to in Section 502 includes liquidation, then Section 506 which specifically provides for liquidation and requires "a like application and order to show cause, and * * * a full hearing" must be followed and notice of liquidation must be given.

Appellees say that this is not the construction placed upon these sections by the Pennsylvania courts. It is the enactment of the General Assembly of Pennsylvania which is sufficiently clear to require no construction, and which had not been rejected by the Supreme Court of Pennsylvania until it held in this case that the decree of June 26, 1947 neither violated these "technical requirements" of the statute nor deprived appellants of due process of law.

The Motion to Dismiss cites no other cases in which the Supreme Court of Pennsylvania, or this Court, have approved a different construction of the statutes. In the cited quotation from *Penn General Casualty Co.* v. *Commonwealth of Pennsyl-*

vania, 294 U.S. 189, 55 S. Ct. 186, 79 L. ed. 850, where the question of the construction of the statute was not in issue, the Court was merely undertaking to show the authority of the state court to proceed with the cause in the absence of jurisdiction having been obtained by a district court. In that case a hearing was had before the Insurance Commissioner on September 14, 1933. A further hearing was held before the Attorney General on October 14, 1933. The suggestion praying for the liquidation of the company was filed in the Court of Common Pleas on December 8, 1933. The order to show cause was served on December 11, 1933. The Court entered its decree liquidating the company March 14, 1934. The company had ample notice and opportunity to defend.

The hearing before the Attorney General under Section 502 of the statute, which may lead to a possession order and subsequent rehabilitation, is not the order to show cause and full hearing required by Section 506 before an order of liquidation is entered and by which specific notice of liquidation must be given. A company may readily consent to the former which would never consent to the latter.

The necessity, under the circumstances which were known by the court and by counsel for the Insurance Department to exist, of affording some sort of notice which would have protected the policyholders as a class, has already been discussed in the Statement of Jurisdiction.

Appellees next contend in this section of the Motion to Dismiss that the company was not entitled to the hearing before the filing of the report of examination provided by Section 213 of the Act nor to the notice of impairment of reserves and an opportunity to repair them provided by Section 321 because these sections do not relate to insolvent companies; that in such cases, Sections 502-506 control.

In making this contention appellees, by construction, have

read limitations into these sections of the Act which have not been placed there by the carefully considered language of the Pennsylvania General Assembly or by the Courts. Obviously a company should be permitted every opportunity afforded by the statute to challenge a report of examination which purports to find it insolvent because its very existence is then threatened. Obviously, also, such a report may hinder but does not preclude a repair of the impairment to its reserves. It is evident that Sections 213 and 321 were not intended to deal only with factual situations not covered by Section 502 when it is reflected that in almost any instance where it is found that there is an impairment of 20% in the capital or reserves which the Commonwealth deemed were necessary to insure the safety of the public, a finding would also be authorized that the further transaction of business would be hazardous to the policyholders, creditors, or the public within the meaning of Section 502.

The only construction of the statute which is significant here is that which has been adopted by the Supreme Court of Pennsylvania in this case. This Court is not required to indulge in statutory construction in order to determine and protect appellants' rights under the due process provision of the Federal Constitution. Those rights would exist, and would have been violated by the manner of liquidation of the company under the statute regardless of whether any provision of the statute required prior notice and hearing. Cf *National Auto Corp.* v. *Barfod*, 289 Pa. 307. These requirements of the statute, which the Supreme Court of Pennsylvania held were not circumvented, merely serve to underscore and emphasize the violation by the Commonwealth of appellants' constitutional rights.

(5) Does the Decision Rest Upon Non-Federal Grounds Which Independently Support the Judgment?

The first three non-Federal grounds which appellees claim independently and adequately support the judgment are: (a) peti-

tioner did not carry the burden of proving the solvency of the company at June 26, 1947, as alleged in the petition to vacate; (b) the company was in a precarious financial condition on June 26, 1947, its officers having admitted its insolvency, that its affairs were mismanaged, its records manipulated and its financial condition fraudulently misrepresented; and, (c) the company was insolvent as of the date of the filing of the petition to vacate. Each of these grounds assumes the validity of the decree of June 26, 1947, and, accordingly, that the burden of proof was properly cast on the petitioner in the hearings on the petition to vacate the decree. If the decree of dissolution was invalid, as contended by appellants, because they were deprived of constitutional rights, the burden would be on the Commonwealth in a new proceeding for liquidation, at a full hearing afforded after adequate notice, to establish one or more of the statutory causes for the liquidation of the company. Accordingly, as no one of these grounds can be supported unless the Federal question is determined in favor of the validity of the liquidation decree of June 26, 1947, so no one of them can independently and adequately support the judgment of the Supreme Court of Pennsylvania.

It is only where the non-Federal ground does not depend upon the decision of any Federal question, and is broad enough to sustain the judgment, that the Supreme Court has no power to disurb it.

> *Enterprise Irrigation District* v. *Farmers Mutual Canal Company*, 243 U.S. 157, 164, 37 S. Ct. 318, 61 L. ed. 644, and citations;
>
> *Postal Telegraph-Cable Company* v. *City of Newport*, 247 U.S. 464, 475, 38 S. Ct. 566, 62 L. ed. 1215.

The Supreme Court of the United States has jurisdiction to review a decision of a state court based upon a Federal and a non-Federal ground where the non-Federal ground is so inter-

woven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision on the other.

> *Abie State Bank* v. *Bryan*, 282 U.S. 765, 773, 51 S. Ct. 252, 75 L. ed. 690.
>
> *Enterprise Irrigation District* v. *Farmers Mutual Canal Company*, 243 U.S. 157, 164, 37 S. Ct. 318, 61 L. ed. 644.

Appellees next contend that the finding by the Supreme Court of Pennsylvania that the officers and directors waived all of the requirements of notice under the Insurance Code was a non-Federal ground which independently and adequately supported the judgment.

It is the duty of the Federal Supreme Court to review and correct the error of a state court in resting its decision denying asserted Federal rights upon a basis of fact which has no support in the record.

> *Postal Telegraph-Cable Company* v. *City of Newport*, 247 U.S. 464, 473, 38 S. Ct. 566, 62 L. ed. 1215.

The limited authority of the officers and directors under the law of Pennsylvania, the limited scope of the resolutions adopted by the directors, and the limited relief to which the attorney consented has already been pointed out in the Statement of Jurisdiction and in the discussion of facts in this brief. It is significant also that the very language of the decree entered on July 26, 1947 assumes a consent "to possession" but nowhere, by its specific terms, recognizes or assumes any agreement to the prayers or to all the averments of the Suggestion or any consent, on behalf of the company, that it be dissolved or liquidated. (R. 1951a) There was no such consent. This finding has no factual support in the record and, if it had occurred, could not bind the company or its members under the law of Pennsylvania. It is without substance.

Appellees next contend that the case was decided by the lower court upon issues of fact involving non-Federal grounds and concludes that this Court is bound by such findings of fact of the State Court. In inquiring whether the State Court rested its decision upon independent non-Federal grounds adequate to support the judgment, the Supreme Court of the United States is unconcerned with the conclusions of the trial court, or with those of an intermediate appellate court, and considers only the action of the Supreme Court of the State from which the appeal s taken.

> *Allen* v. *Southern Pacific Railroad Company*, 173 U.S. 479, 489, 19 S. Ct. 518, 43 L. ed. 775.

It is the judgment of the Supreme Court of Pennsylvania which is sought to be reviewed here; not that of the lower court. The State Supreme Court specifically passed upon the Federal question and decided it against the contentions of Appellants. Appellees cannot reach down to the lower court in their frantic search for substantial non-Federal grounds. Any specific issues of fact, involving non-Federal grounds, which independently and adequately supported the judgment in the State Supreme Court appealed from should be pointed out by appellees.

In subdivision (e) it is contended that the notice and hearing provisions of the Insurance Code, as construed by the Pennsylvania Courts, relate only to solvency, and as the findings of fact establish the insolvency of the company, no one has been harmed by lack of notice or of opportunity to be heard.

It is no answer to one who protests against the taking of his property without due process of law that due process of law would have led to the same result.

> *Coe* v. *Armour Fertilizer Works*, 237 U.S. 314, 424, 35 S. Ct. 625, 59 L. ed. 1027.

Certainly Appellees cannot and do not claim that the company was not hurt by a finding, at the hearing of which it was denied

BLEED. THROUGH POOR COPY

adequate notice, of one of the very charges against which it was not permitted the time or opportunity to defend. Accordingly, we must assume that this contention has reference to the findings of the Court of Common Pleas on the petition to vacate the decree. These findings were based upon the assumption of the validity of the decree of June 26, 1947, which the Court held to impose upon the Commonwealth the burden of establishing by "clear and satisfactory" evidence that the company was solvent on the date of dissolution and that this burden was not carried. (R. 1725a, 1726a) Thus again, this contention is dependent upon the decision of the Federal question. However, it should also be noted that neither the Supreme Court of Pennsylvania in this case nor any other authority cited by appellees has held in express terms nor in language which may readily be so interpreted that the notice and hearing provisions of the Insurance Code relate only to the issue of solvency. Such a construction would certainly be at variance with the unambiguous words of the statute. But it would also, unquestionably, give this Court jurisdiction on appeal in a case where the company was denied adequate notice and a full hearing on several vague and general charges which included not only its solvency but also mismanagement, the writing of hazardous business, maintaining inadequate records, falsifying an annual report and issuing cash or nonassessable policies beyond the date when it was possessed of the surplus required by law. (R. 1760a) The question then would involve not only the proper construction of a state statute, as suggested by appellees, but also whether the statute as construed to require notice and a full hearing only on the charge of insolvency and not on the other charges would be repugnant to the due process provision of the Federal Constitution.

Standard Oil Company of California v. *Johnson*, 316 U.S. 481, 482, 62 S. Ct. 1168, 86 L. ed. 1611.

Ward & Gow v. *Krinsky*, 259 U.S. 503, 510, 42 St. Ct. 529, 66 L. ed. 1033.

Finally, in subsection (f) of their Motion to Dismiss appellees contend that the Court did not uphold the validity of the decree against an attack on federal grounds but discussed "due process" generally. This question has been sufficiently answered in an earlier part of this brief and it is deemed unnecessary to repeat the language of that decision specifically so deciding.

IV. Conclusion

In *Gelpcke* v. *City of Dubuque*, 68 U.S. (1 Wall.) 175, 206, 17 L. ed. 520, this Court said:

> "We shall never immolate truth, justice, and the law, because a state tribunal has erected the altar and decreed the sacrifice."

The requirements of Section 213 of the Pennsylvania Insurance Department Act that the Insurance Commissioner grant the company a hearing before a report of examination is filed; those of Section 321 that he give the company sixty days notice to make good an impairment of twenty per centum in the company's reserves; and those of Section 506 that an order to show cause issue and a full hearing be granted before the court decrees the liquidation of the company were intended to provide the company and its members with adequate notice of any charges which might result in the liquidation of the company, and an opportunity to be heard concerning them. If the charges are contained in or based upon a report of examination, additional notice and hearing are provided. These provisions are effective, however, and will afford the protection required by due process only if they are obligatory upon the Insurance Commissioner and upon the Commonwealth.

In this case the protection which the plain language of those sections appears to require was not afforded to the company or to appellants. The charges were not made specific and were

based upon a report of examination which was not completed until June 24, 1947 and was not shown to the company until June 25, 1947, at which time the dissolution of the company was first suggested. On the following morning its dissolution was decreed. Thus, the blindfold was removed barely in time for the company to see, but not to resist, the coup de grace.

When the Supreme Court of Pennsylvania held that these "technical requirements" of the Insurance Code had not been violated, or had been waived, it unquestionably vested jurisdiction by way of appeal in this Court because it construed the Act and found it valid as so construed and applied. It also erected the altar and decreed the sacrifice when it found a waiver which the facts and the law abundantly demonstrate did not and could not exist. Appellants respectfully submit that this Court has jurisdiction on appeal and that the Motion to Dismiss should be denied.

ELLIS G. ARNALL

CLEBURNE E. GREGORY, JR.

ARNALL, GOLDEN & GREGORY

621 First National Bank Bldg.

Atlanta, Georgia

WALTER M. NEWMAN

WALKER & NEWMAN

1100 Jones Law Bldg.

Pittsburgh, Pennsylvania

Attorneys for Appellants.

Office - Supreme Court, U. S.
FILED
AUG 3 1953
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 229

ROLAND O. HAINES, ET AL., COMPRISING KEYSTONE POLICYHOLDERS' COMMITTEE,

Appellants,

vs.

COMMONWEALTH OF PENNSYLVANIA, ET AL.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

D. AUTHUR MAGAZINER,
MAURICE STERN,
DAVID A. SALTZBURG,
JOSEF JAFFE,
Counsel for Appellees.

INDEX

Subject Index

	Page
Statement opposing jurisdiction	1
Summary of relevant facts	1
Appeal does not lie as the method of review	5
There is no jurisdiction to review either by way of appeal or certiorari	8
The decree of dissolution was not appealed	8
The federal question was not properly raised or preserved in the state courts	9
There is no present case or controversy	13
No substantial federal question is presented	15
The decision rests upon non-federal grounds which independently support the judgment	20
Motion to dismiss appeal on grounds of jurisdiction under Rule 12(3)	23

Table of Cases Cited

Anderson National Bank v. *Luckert*, 321 U.S. 233	18, 19
Bowe v. *Scott*, 233 U.S. 658, 34 S. Ct. 769, 58 L. Ed. 1141	12
Buchanan, In re, 158 U.S. 31, 15 S. Ct. 723, 39 L. ed. 884	21
Chapin v. *Fye*, 179 U.S. 127, 21 S. Ct. 71, 45 L. ed. 119	12
Charleston Federal Savings and Loan Association v. *Alderson*, 324 U.S. 182, 65 S. Ct. 624, 89 L. ed. 857	6, 8, 12
Commonwealth v. *Ministers Protective Society*, 294 Pa. 6	16
Commonwealth, ex rel. v. *Equitable Casualty and Surety Company*, 306 Pa. 19	16, 17
Commonwealth, ex rel. v. *Penn General Casualty Company*, 316 Pa. 1	16

ED. THROUGH POOR COPY

Page

Consolidated Turnpike Company v. *Norfolk and Ocean View Railway Company*, 228 U.S. 326, 33 S. Ct. 510, 57 L. ed. 857 12

De Jonge v. *Oregon*, 229 U.S. 353, 57 S. Ct. 255, 81 L. ed. 278 11

Forbes v. *State Council of Virginia*, 216 U.S. 396, 30 S. Ct. 295, 54 L. ed. 534 12

Gibbes v. *Zimmerman*, 290 U.S. 326, 54 S. Ct. 140, 78 L. ed. 342 12

Grayson v. *Harris*, 267 U.S. 352, 45 S. Ct. 317, 69 L. ed. 652 21

Highlands Farms Dairy v. *Agnew*, 300 U.S. 608, 57 S. Ct. 549, 81 L. ed. 835 13

King v. *West Virginia*, 216 U.S. 92, 30 S. Ct. 225, 54 L. ed. 396 21

Little v. *Bowers*, 134 U.S. 547, 10 S. Ct. 620, 33 L. ed. 1016 13

Live Oak Waters Users Association v. *Railroad Commission of California*, 269 U.S. 354, 46 S. Ct. 149, 70 L. ed. 305 ..... 6, 11

Middletown v. *Pennsylvania Public Utility Commission*, 143 Pa. Super. Ct. 444 5

Mills v. *Green*, 159 U.S. 651, 16 S. Ct. 132, 40 L. ed. 293 14

Mine Safety Appliances v. *Forrestal*, 326 U.S. 371, 66 S. Ct. 219, 90 L. ed. 140 13

Montgomery County Bar Association v. *Rinalducci*, 329 Pa. 296 ..... 5, 11

Morrison v. *Watson*, 154 U.S. 111, 14 S. Ct. 995, 38 L. ed. 927 21

Mutual Life Insurance Company v. *McGrew*, 188 U.S. 291, 23 S. Ct. 375, 47 L. ed. 480 9

Otto v. *Western Saving Fund Society*, 343 Pa. 615 ..... 5, 9

Penn General Casualty Company v. *Commonwealth* of *Pennsylvania*, 294 U.S. 189 ..... 17, 18

Pennsylvania Railroad Company v. *Illinois Brick Company*, 297 U.S. 447, 56 S. Ct. 556, 80 L. ed. 796 9

Philadelphia Association L. S. v. *Philadelphia*, 139 Pa. Super. Ct. 560 6

Pink v. *A.A.A. Highway Express, Incorporated*, 314 U.S. 201 18

Page

Quong Ham Wah Company v. *Industrial Accident Commission of California*, 255 U.S. 445, 41 S. Ct. 373, 65 L. ed. 723 21

Stainback v. *Mo Hock Ke Lok Po*, 336 U.S. 368, 69 L. ed. 606, 93 L. ed. 741 8

Texas and Pacific Railway Company v. *Abilene Cotton Oil Company*, 204 U.S. 426, 27 S. Ct. 350, 51 L. ed. 553 11

Thomas v. *Iowa*, 209 U.S. 258, 28 S. Ct. 487, 52 L. ed. 782 12

Union Trust of Pittsburgh Case, 359 Pa. 363 18

Wilson v. *Cook*, 327 U.S. 474, 66 S. Ct. 663, 90 L. ed. 793 8

STATUTES AND OTHER AUTHORITIES CITED

Act of June 25th, 1947, c. 646, 62 Stat. 929, 28 U.S.C. 1257(2) 5, 9

Constitution of the Commonwealth of Pennsylvania, Article 1, Section 9 6

Michigan Law Review, Volume 37, Page 540 8

Pennsylvania Insurance Department Act of May 17th, 1921, P. L. 7891, (40 P.S. 202-206):

Section 213 ..... 5, 7, 19
Section 214 .....
Section 321 ..... 5, 7, 19
Section 501 5
Sections 502 through 506 ..... 1, 7, 14, 15, 16, 17
Section 507 5

Pennsylvania Statutes, Title 40:

Section 51 19
Section 131 19
Sections 202 through 206 1

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 229

ROLAND O. HAINES, ET AL., Comprising Keystone Policyholders' Committee,

Appellants,

vs.

COMMONWEALTH OF PENNSYLVANIA, ET AL.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT

STATEMENT UNDER RULE 12 (3) OPPOSING THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

I. Summary of Relevant Facts

On June 26, 1947, the Court of Common Pleas of Dauphin County, Pennsylvania, entered a final decree dissolving the Keystone Mutual Casualty Company, vacating its charter, ending its corporate existence and directing the Insurance Commissioner to liquidate its business and affairs under Sections 502-506 of the Insurance Department Act of May 17, 1921, P. L. 7891 (40 P. S. 202-206). The decree was en-

tered upon suggestion of the Attorney General acting at the relation of the Insurance Commissioner and established that the Company was insolvent and that its further transaction of business would be hazardous to its policyholders, its creditors and to the public (R. 1831a, 1833a).

Prior to the entry of the decree an audit of the Company's assets and liabilities disclosed that it had a deficit of approximately one and one-half million dollars instead of a surplus of approximately the same amount, as reported in its 1946 annual statement. (R. 1035a-1037a).

The principal officers and managing heads of the Company had examined the balance sheet of the auditors establishing its insolvency and had admitted that the figures were substantially correct (R. 897a, 949a, 984a, 1347a, 1348a). Moreover, independently of the audit, the said officers had admitted to the Insurance Commissioner that the Company was insolvent and that they had falsified the annual statement of the Company in a material respect for which act they were subsequently indicted and convicted of a criminal offense. (R. 751a, 825a).

Prior to the entry of the decree, the Secretary and managing head of the Company acknowledged that funds could not be raised to place the Company in a solvent condition (R. 895a). Further, the Company was represented by counsel at a hearing before the deputy Attorney General on June 25, 1947, at which time he reiterated the impossibility of raising the required funds but acknowledged that the Insurance Commissioner had extended every opportunity to the Company to accomplish this. (R. 1768a, 1769a).

The hearing held before the deputy Attorney General prior to the application for the decree of dissolution was pursuant to Section 502 of the Insurance Department Act and written notice of the said hearing was given to each director and principal officer on June 14, 1947. (R. 1759a, 1760a). The Board of Directors of the Company met on

June 24, 1947 at which time a resolution was adopted reciting the efforts of the Company to raise money and its inability to do so, directing that the Insurance Commissioner immediately take charge of the Company, accepting the resignations of all officers in order to facilitate a purchase or rehabilitation of the Company, and authorizing N. P. Kann, Secretary and attorney-in-fact, to join with the Insurance Commissioner "in any legal action necessary for the Insurance Commissioner to take charge of the Company". (R. 1761a, 1762a).

None of the officers or directors appeared at the hearing but the Company was represented by its general counsel who was present and did not object or protest when the deputy Attorney-General announced his intention of applying for an order of court liquidating the Company. (R. 1776a).

On June 26, 1947, the same attorney entered a general appearance for the Company in the legal proceedings instituted, joined in writing in the prayer of the Suggestion of the Attorney General, waived issuance of the rule and notice required under Section 504 of the Act and consented to the granting of the relief prayed for "to the extent of the authorization contained in the resolution of the Board of Directors—" (R. 1839a). Included in the very suggestion consented to was a prayer for liquidation of the Company. (R. 1958a).

From the date of the entry of the final decree on June 26, 1947 until December 18, 1950, the assets of the Company were being liquidated by the Insurance Commissioner during which time twenty-six States in which the Company did business were giving full faith and credit to the final decree and were turning over assets to the Pennsylvania Insurance Commissioner. Also, during this period of three and one-half years, many cases against assured of the Company had been settled, judgments against assureds

had been entered, many injured persons had waived their rights and thousands of claimants had abandoned claims. (R. 1732a, 1735a, 1747a).

No appeal was ever taken from the entry of this final decree. (Docket Entries, R. 19472) (Opinion of Court, R. 1701a). Until the appeal to the Supreme Court of Pennsylvania on the collateral issue of a mistake of fact approximately five years after the entry of the decree, no officer, director, policyholder or attorney complained of lack of notice or opportunity to be heard. No testimony was solicited at the hearings of the case from the officers or directors, although N. P. Kann, Secretary and manager, was an intervenor, and J. D. O'Neil, a Vice-President, was a member of an intervening committee, appellants here.

On December 18, 1950, a succeeding Attorney General and Insurance Commissioner filed a petition with the Dauphin County Court to vacate the Decree of June 26, 1947 averring that it was entered under a mistake of fact in that the Company was solvent as of that date, that the Company was still solvent and could be rehabilitated and that the vacation of the decree was sought for the purpose of effecting a rehabilitation of the Company. Nowhere in this petition is there any averment of lack of notice or an absence of due process of law in the entry of the decree. (R. 13a). Appellants, representing certain policyholders, joined in the prayer of the petition which was opposed by the Goldstein Committee, appellee here, and by others, representing claimants and creditors. (R. 191a).

A lengthy trial of the issues was held in the Dauphin County Court before Judge Neely, sitting as a jury, and in a comprehensive opinion containing findings of fact and conclusions of law dated March 17, 1952, joined in by the entire lower Court sitting en banc, the petition to vacate was dismissed (R. 1657a). Neither the present Attorney General nor the Insurance Commissioner, at whose instance

the petition to vacate was filed, appealed from the findings of the lower Court or from the order dismissing the petition. Appellants, however, appealed to the Supreme Court of Pennsylvania which affirmed the judgment of the lower Court.

II. Appeal Does Not Lie as the Method of Review

The validity of a state statute as being repugnant to the Constitution or laws of the United States was not drawn in question. Act of June 25, 1947, c. 646, 62 Stat. 929, 28 U. S. C. 1257 (2).

No appeal was taken from the entry of the final decree of liquidation and dissolution. The proceedings giving rise to this appeal were based upon a petition to vacate the decree on the equitable ground of a mistake of fact as to the insolvency of the Company and the corresponding answer denying the mistake of fact. (R. 12a, 13a). The petition did not even raise the question of lack of notice or lack of due process in the entry of the decree, much less the effect and requirements of Secs. 213, 321 and 501, 507, inclusive, of the Pennsylvania Insurance Department Act, the validity of which it is now contended, were drawn in question.

Under the law of Pennsylvania, the issue was determined by the pleadings. *Otto* v. *Western Saving Society*, 343 Pa. 615 (1942).

The question of lack of notice and lack of due process was raised for the first time at the oral argument before the lower Court en banc and it was raised by the deputy Attorney General who has not appealed. It was never raised by the appellants. Under the law of Pennsylvania, matters not properly raised in the Court below cannot be invoked on appeal, notwithstanding that they involve constitutional questions. *Montgomery County Bar Assn.* v. *Rinalducci*, 329 Pa. 296; *Middletown* v. *Pennsylvania Public Utility*

Commission, 143 Pa. Super. Ct. 444; *Phila. Assoc. L. S.* v. *Philadelphia*, 139 Pa. Super. Ct. 560.

In appellants' statement of the questions to be argued on appeal in the Supreme Court of Pennsylvania (required by the Rules of the Supreme Court of Pennsylvania) the only indirect reference to the subject matter is contained in question number five, as follows:

> "5. Did the decree of dissolution, entered on June 26, 1947, deprive the company and its policyholders of property without due process of law?"

The briefs filed by appellant in the Supreme Court of Pennsylvania make reference to the particular sections of the Insurance Department Act now alleged to have been drawn in question, but such briefs do not form part of the State Court record for the purpose of review by the Supreme Court of the United States. *Live Oak Water Users Assn.* v. *Railroad Commission of California*, 269 U. S. 354, 357-358, 46 S. Ct. 149, 70 L. Ed. 305.

The reference to "due process of law" in appellants' statement of questions number 5 was not directed explicitly to the requirements of the Constitution of the United States even by implication since a similar clause is contained in the Constitution of the Commonwealth of Pennsylvania, Article 1, Section 9.

There has not been the "explicit and timely insistence" in the State Courts that the Insurance Department Act as applied is repugnant to the Constitution of the United States which is essential to jurisdiction on appeal. *Charleston Federal Savings & Loan Assn.* v. *Alderson*, 324 U. S. 182, 65 S. Ct. 624, 89 L. Ed. 857.

Nor did the decision of the Supreme Court of Pennsylvania sustain the validity of the Insurance Department Act against an attack on federal grounds as required for jurisdiction on appeal. 28 U. S. C. 1257 (2).

The Opinion of the Supreme Court of Pennsylvania affirming the judgment of the lower Court makes no reference to the due processes clauses of the Federal Constitution, as distinguished from the due process clause of the State Constitution. It was unnecessary to do so since appellants had not been explicit in their statement of questions to be argued on appeal.

Further, appellants have never contended that the Insurance Department Act does not provide adequate notice and an opportunity to be heard. They contend that the Company and its policyholders were deprived of their property without due process of law because the respective notices and hearings allegedly *required* by Sections 213, 321 and 506 of the Act were not given to them. Appellants state (Page 9 of Statement as to Jurisdiction) that "notwithstanding the mandatory nature of these safeguards in the Insurance Department Act, the Court of Common Pleas decided against these contentions."

As far back as the oral argument before the lower Court sitting en banc., the deputy Attorney General stated in his brief: (Page 28)

> "The deficiencies in the present case are not at all attributable, however, to the statute, compliance with which would have satisfied the requirements of due process (National Auto Corp. v. Barford, supra at 313), but rather to a lack of adherence to the fundamental requirements of the statute itself."

The Supreme Court of Pennsylvania, therefore, was never asked to consider the constitutionality of these particular sections but rather whether the notices and hearings required were indeed given or waived.

The jurisdiction of the Supreme Court of the United States to review a judgment or decree of a State Court on appeal, as distinguished from certiorari, is not established by a mere showing that determination of the cause involves

consideration of a statute instead of expressly sustaining the validity of the statute against an attack on federal grounds. *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368, 69 S. Ct. 606, 93 L. Ed. 741.

Where it is claimed that rights and immunities under the Federal Constitution prevent the application of the statute, rather than the point that the State Statute, if so applied, would be invalid because repugnant to the Federal Constitution, an adverse ruling of the State Court is a denial of a claim of Federal rights and immunities and not a ruling upon the validity of the statute itself. In such case, the remedy, if there be one at all, is by way of certiorari and not by way of appeal. *Wilson* v. *Cook*, 327 U. S. 474, 482; 66 S. Ct. 663, 90 L. Ed. 793; *Charleston Federal S & L Assn.* v. *Alderson*, *supra*; 37 Mich. L. Rev. 540.

III. There Is No Jurisdiction to Review Either by Way of Appeal or Certiorari

(1) The Decree of Dissolution Was Not Appealed

The original decree of June 26, 1947 was a final order and decree from which no appeal was taken. By a petition filed over three and one-half years later, appellants invoked the equitable power of the Court to vacate the decree because, it was alleged the Company was solvent both at the time of the entry of the decree and at the time of filing the petition and there appeared to be no valid reason why an attempt should not be made to rehabilitate the Company. The issue raised by the pleadings was purely factual.

Had the petitioner raised the issue of lack of notice or lack of due process in the entry of the decree as the basis for the petition to vacate, he would have been confronted with the fatal objection that the decree was not appealed to the Supreme Court of Pennsylvania within the required period of three months.

Appellants, having adopted the petition of the Attorney General, are in no better position than he would have been. What they are really endeavoring to accomplish indirectly is a review of the original decree which, not having been appealed, was not a judgment of the highest Court of the State of Pennsylvania as required by the Judicial Code. 28 U. S. C. 1257.

Not having appealed the original decree, the most that appellants could expect in the subsequent proceedings was that some consideration be given the allegation of lack of due process as one of a number of other factors to influence the exercise of the equitable powers of the Court. There is no right of appeal from the exercise of such powers except for gross abuse of discretion and this does not involve any Federal question.

(2) The Federal Question Was Not Properly Raised or Preserved in the State Courts

It has already been stated in more detail that the issue presented by the pleadings was limited to the question of a mistake of fact as to the insolvency of the Company and that under the law of Pennsylvania the issue is determined by the pleadings. *Otto* v. *Western Saving Fund Society, supra.*

It is well settled that the proper time to raise a Federal question is in the trial court whenever that is required by State practice and the Supreme Court of the United States will abide by such local practice. *Mutual Life Insurance Co.* v. *McGrew*, 188 U. S. 291, 308, 23. Ct. 375, 47 L. Ed. 480; *Pennsylvania R. R. Co.* v. *Illinois Brick Co.*, 297 U. S. 447, 462-463, 56 S. Ct. 556, 80 L. Ed. 796.

Not only did the petition and answer fail to raise the issue of due process but all counsel acknowledged in open Court that the only issue involved was the fact of insolvency.

At the hearing on February 20, 1951, the deputy Attorney General requested leave of court to amend his petition in order to eliminate the necessity of filing a plan of rehabilitation "so that it would merely leave the issue as to insolvency or solvency . . ." (R. 124a). The request was granted at a further hearing on May 14, 1951, at which time the trial judge stated that the amendment was granted—

> "in the interest of having the issue clearly defined . . . namely, whether or not there was an insolvency and is now an insolvency of this company, and also, if so, whether or not the company should be delivered into the hands of the Insurance Commissioner . . ." (R. 200a).

In response, the deputy Attorney General acknowledged that the trial judge "stated as clearly as anyone could state what the issues were and are" (R. 201a).

At the same hearing, counsel for the appellants addressed the Court at length regarding the issues involved (R. 208a-210a). He mentioned nothing about lack of notice or lack of due process and clearly stated:

> "I think the record to be laid before us will show also that the company has never been insolvent . . . If it weren't for that, there would be nothing to fight over and no point in my clients fighting and no point in my being here. For that reason, I am glad to note that Mr. Stern and Mr. Saltzburg recognize that the issue is a solvency." (R. 210a).

At still a further hearing on June 18, 1951, the deputy Attorney General stated:

> ". . . Your Honor ruled on it . . . that the issue to be tried in this proceeding was limited to the question of whether or not at December 31, 1946 this company was solvent or insolvent, and whether or not it is now solvent . . . We have prepared our proofs on the basis of that issue. . . " (R. 220a).

Again he repeated that—

> "We will proceed, sir, on the theory and remain on that theory that this order to dissolve the corporation, to vacate its charter was entered on a mistake of fact." (R. 223a).

The concession of the parties bind them upon review by the Supreme Court of the United States. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 434-435, 27 S. Ct. 350, 51 L. Ed. 553; *De Jonge* v. *Oregon*, 229 U. S. 353, 358, 57 S. Ct. 255, 81 L. Ed. 278.

Because of the insufficiency of the evidence adduced by the appellants on the fact of insolvency, the alleged mistake of fact, equitable relief was denied. The appellants, who proceeded on the adequacy of notice and the validity of the Insurance Code during the trial of the issues, raised for the first time the issue of lack of due process at the oral argument before the lower Court en banc.

Under the law of Pennsylvania, matters not raised in the court below cannot be invoked on appeal even though they involve constitutional questions. *Montgomery County Bar Assn.* v. *Rinalducci*, and other cases cited, *supra*.

The briefs filed in the lower Court and in the Supreme Court of Pennsyvania cannot supply the deficiency in jurisdiction and do not even form part of the record for the purpose of review. *Live Oak Water Users Assn.* v. *Railroad Commission of Calif.*, *supra*.

In the appeal to the Supreme Court of Pennsylvania, appellant was limited to the issue of the solvency of the Company. Appellants' inclusion of extraneous matters in its statement of questions to be argued on appeal cannot correct the deficiency.

Assuming, arguendo, that appellant had the right to argue the question of due process on appeal, its assignment of error in this regard falls far short of the requirement that

there be an "explicit and timely insistence" upon the Federal question.

For reasons hereinbefore set forth, appellants' statement of questions to be argued on appeal before the Supreme Court of Pennsylvania (Question number 5) makes no reference to the particular statute or sections thereof which are alleged to be in issue; nor is it alleged whether the Federal or State Constitution is involved. This is fatal to jurisdiction. *Charleston Federal Savings and Loan Assn.* v. *Alderson, supra; Chapin* v. *Fye*, 179 U. S. 127, 130, 21 S. Ct. 71, 45 L. Ed. 119; *Gibbes* v. *Zimmerman*, 290 U. S. 326, 328, 54 S. Ct. 140, 78 L. Ed. 342; *Bowe* v. *Scott*, 233 U. S. 658, 664-665, 34 S. Ct. 769, 58 L. Ed. 1141.

The bald allegation that there has been a lack of "due process" is never sufficient. *Thomas* v. *Iowa*, 209 U. S. 258, 263, 28 S. Ct. 487, 52 L. Ed. 782.

Appellants' petition for reargument before the Supreme Court of Pennsylvania attempted, for the first time to cure the defect. Reargument was denied, but this decision can be supported by the non-federal reason that the issue had not been previously raised, especially where the federal question was not specifically decided upon the petition for reargument. *Consolidated Turnpike Co.* v. *Norfolk & Ocean View Ry. Co.*, 228 U. S. 326, 333-334, 33 S. Ct. 510, 57 L. Ed. 857; *Forbes* v. *State Council of Virginia*, 216 U. S. 396, 399, 30 S. Ct. 295, 54 L. Ed. 534.

From the date of the decree until the argument before the lower Court, a period of over four years, no policyholder, creditor, officer or director claimed that there had been a failure of notice or opportunity to be heard. Constitutional rights must be rigidly protected and enforced, but persons seeking them must assert their rights in season and not to the prejudice of intervening rights.

Appellants contend (Page 21) of Statement As To Jurisdiction, that they did not sleep on their rights because a

committee of policyholders known as the Matlack Committee had previously intervened on June 2, 1948, and appellants succeeded the prior Committee "in a timely fashion to continue its challenge."

First, the intervention by the Matlack Committee, one year after the entry of the decree, cannot be said to be a timely intervention. Second, the Matlack Committee was permitted to intervene only to determine whether under the facts and the law a rehabilitation of the Company was possible. It did not allege any mistake of fact as to the insolvency of the Company at the time of the entry of the decree or any impropriety in the proceedings. It merely sought to determine whether the Company was still insolvent. This Committee was permitted to withdraw from the case upon its own petition which stated that solvency or insolvency as of the present date could not be proved and that the difficulties presented in a rehabilitation of the Company were virtually insurmountable. (R. 1974a).

When appellants sought leave to intervene, they stated that the purpose of their intervention was to seek a rehabilitation of the Company. At no time did they allege that the decree was entered without due process of law. Every aspect of the case points unequivocally to a waiver by appellants of any defect in the entry of the decree by reason of constitutional requirements.

(3) There Is No Present Case or Controversy

There is no jurisdiction to review cases on federal grounds where the question is moot, the controversy has been extinguished, the questions sought to be reviewed are wholly abstract or the happening of events has rendered it impossible for the Court to grant any effectual relief. *Little* v. *Bowers*, 134 U. S. 547, 556-557, 10 S. Ct. 620, 33 L. Ed. 1016; *Mine Safety Appliances* v. *Forrestal*, 326 U. S. 371, 372, n. 2, 66 S. Ct. 219, 90 L. Ed. 140; *Highland Farms*

Dairy v. *Agnew*, 300 U. S. 608, 614, 57 S. Ct. 549, 81 L. Ed. 835; *Mills* v. *Green*, 159 U. S. 651, 653, 16 S. Ct. 132, 40 L. Ed. 293.

Under Section 502-506 of the Pennsylvania Insurance Department Act, where an insurance company is insolvent or is in a hazardous condition, the Insurance Commissioner, through the Attorney General, may apply to the Court for an order to show cause why the Commissioner should not take possession of the company. The Court may then order the Insurance Commissioner to conduct the business or it may order liquidation.

Appellants have admitted throughout the proceedings that the Company should have remained in the hands of the Insurance Commissioner with a view toward rehabilitation, but it should not have been liquidated because it was not insolvent and the policyholders, officers and directors did not have adequate notice of the several hearings to prove this fact and resist the liquidation order.

At the intitial hearings, the deputy Attorney General stated:

> "502 is the possession section and only the possession section. However, when the matter got to the point of presentation to this Court, it was presented under section 506, which is the dissolution section. . . Assuming that the testimony offered will justify the conclusion that this company was solvent. . . then we are confronted with the consideration perhaps of modifying the decree that was entered by this Court in June of 1947, to meet the statutory requirements on this Section 502." (R. 203-205a).

Counsel for appellants then stated that he "concur(red) completely with Mr. Sterling's idea that the remedy here is that provided by Section 502 and not the drastic dissolution provided by Section 506."

If anyone was prejudiced by the failure to receive ade-

quate notice or an opportunity to be heard at the time of the original decree, they certainly had full opportunity at the lengthy hearings on the petition to vacate the decree. The findings of fact, affirmed by the Supreme Court of Pennsylvania, conclusively establish that petitioners did not meet their burden of proving the solvency of the Company at the time of the entry of the decree (R. 1687a).

Of equal importance, it was established that the Company was still insolvent at the very time the petition to vacate was filed (R. 1687a). It would be a vain and useless act to vacate the decree and place the Company in the hands of the Insurance Commissioner to conduct its business only to be met with a new petition for liquidation on the ground of insolvency.

Especially is this true where the Insurance Commissioner, who did not appeal from the decision of the lower Court, has advised the Supreme Court of Pennsylvania that he doubts whether a rehabilitation of the Company could now be consummated even if the Company were solvent and "he believes that compliance with (the) admonitions (of the Court below) is in the best interests of the public and of the company, its creditors and policyholders" (See Page 3, Opinion of Bell, J.).

(4) No Substantial Federal Question Is Presented

Appellants' contentions are based upon a strained construction of the Pennsylvania Insurance Code.

Section 502 provides that when an insurance company is *insolvent or in a hazardous condition* the Attorney General shall, after hearing, apply to the Court for an order to show cause why the Insurance Commissioner should not take possession, and conduct the business, *and for such other relief* as may be required.

Sections 505 and 506 then explain the two remedies to be followed where an application is made as provided for in

Section 502. Under Section 505, the Court shall authorize the Commissioner to conduct the business until it can be returned to the Company or, under Section 506 it may order liquidation of the Company.

Appellants contend that after the waiver of hearing by the Company under Section 502, there should have been another hearing granted under Section 506 before the order of liquidation was entered. This is not the construction placed upon these sections by the Pennsylvania Courts. Further, Section 502, of itself, authorizes the entry of a decree of dissolution since it provides for "such other relief as the nature of the case and the interest of its policyholders, creditors, stockholders, or the public may require."

That Sections 502 and 506, together, with the intervening Sections of 503, 504 and 505, are related steps of an integral whole governing the manner of handling an insurance company when its business can no longer be conducted safely with due regard for the public interest has been frequently asserted and established by the Supreme Court of Pennsylvania.

Commonwealth v. *Ministers Protective Society*, 294 Pa. 6, 10, 16 (1928).

In *Commonwealth, ex rel.* v. *Equitable Casualty & Surety Co.*, 306 Pa. 19 (1931):

> "The act requires that, when an insurance company becomes insolvent or otherwise contravenes Section 502, . . . the attorney general, . . . may apply . . . for an order directing such company to show cause why its business should not be wound up or closed."

In *Commonwealth ex rel.* v. *Penn General Casualty Co.*, 316 Pa. 1, 4 and 5 (1934), the Supreme Court of Pennsylvania said:

> "Pennsylvania has provided a most complete system for the regulation and liquidation of insolvent insur-

ance companies and the winding up of their affairs in 'The Insurance Department Act of 1921,' approved May 17, 1921, P. L. 789, 40 P. S., Section 1 and 'The Insurance Company Law of 1921,' approved May 17, 1921, P. L. 682, 40 P. S., Section 341. Speaking of the former act, we said in *Com. v. Equitable Casualty & Surety Co.*, 306 Pa. 19, that it is a comprehensive statute regulating the business of insurance in the Commonwealth."

The Supreme Court of the United States also recognized the integrity and the correlated Sections of 502, 503, 504, and 506 in connection with the liquidation of an insurance company.

In *Penn General Casualty Co.* v. *Commonwealth of Pennsylvania*, 294 U. S. 189 (1935) Justice Stone said:

"Section 502 of the Insurance Department Act authorizes the Commissioner to liquidate an insurance company when its condition is such that further transaction of its business will be hazardous; such liquidation is permitted only on an order or decree of the Court of Common Pleas, granted on application of the Attorney General of the state. Upon such application the Court is authorized by Section 505 to enjoin the company from transacting any business and from disposing of its property, and after a hearing to direct the Insurance Commissioner to take possession of the property and to liquidate it pursuant to the statute. By Sections 506, 507, the order of the court vests the Commissioner with the title to the property and supersedes the authority of any receiver appointed by any other state court."

It is suggested that the Federal question raised by the appellants is not only not substantial but the effort to raise it is based on a construction of the statutes which have not been accepted by the Supreme Court of Pennsylvania nor the Supreme Court of the United States.

The inconsequential substance of the complaint of lack of

LEED. THROUGH POOR COPY

adequate notice is further manifested by the obvious attempt to assert that the notice to the company should have been supplanted by notice to the policyholders or creditors. This overlooks the very obvious point that the Insurance Code of Pennsylvania regulates Insurance Companies. Policyholders and creditors have derivative rights and liabilities by virtue of their relation to the company.

Pink v. *A A A Highway Express, Inc.*, 314 U. S. 201 (1941).

Policyholders are not entitled to a special notice under the statutes separate and apart from the notice to the insurance company. Surely it is not to be expected that approximately 105,000 policyholders were to receive notice and be given an opportunity to be heard while the assets were being dissipated. Due process has never meant that everyone who may be affected by a decree need have notice and be a party to every stage of the proceedings. The due process clause requiring notice and opportunity to be heard follows a rule of reason.

Union Trust of Pittsburgh case, 359 Pa. 363 (1948);

Pink v. *AAA Highway Express, Inc.*, 314 U. S. 201 (1941);

Anderson National Bank v. *Luckert*, 321 U. S. 233 (1944).

Notwithstanding that appellants recognized that the notice was adequate under Section 502 and that they relied on that section in the trial of the case, they now claim that no notice was given under Section 506. The appellants overlook the fact that the order or decree made under Section 506 is the normal and sequential result of the initiatory proceedings under Section 502.

Penn General Casualty Co. v. *Commonwealth of Pennsylvania*, 294 U. S. 189 (1935).

The fact that the decree of dissolution was entered without formal hearing did not deprive the company of due process. The hearing had already been held under Section 502 and the Company together with its officers and directors had received notice of the fact that the company could no longer do business in conformity to law as established by the Commonwealth and conceded by the company. Another hearing would have been a vain and repetitious thing. The important requirement of due process is not the hearing but the opportunity to be heard.

In the case of *Anderson National Bank* v. *Luckett*, 321 U. S. 233, Mr. Chief Justice Stone stated (p. 246):

> "The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the Constitutional protection is invoked. If that is preserved, the demands of due process are fulfilled."

Appellants admit that the Company had no right to continue business because its reserves were below the statutory requirements, but they complain that under Section 321 of the Act (40 P. S. 131) it should have been given notice of an impairment of reserves and an opportunity to repair them.

It is obvious that Section 321 deals with companies that are not insolvent and that Sections 502-506 control where there is insolvency. Further, the Company, through its Board of Directors, had actual knowledge of the impairment and by resolution, conceded that it had made an effort to raise funds but was unable to do so. (R. 1761a-1762a).

Equally obvious is the requirement of Section 213 of the Act (40 P. S. 51). This section provides that an insurance company shall be granted a hearing before the filing of a report of an examination of its financial condition. This section can only apply to a solvent company engaged in

business. Moreover, the Company here was granted a full hearing before the deputy Attorney General prior to filing the particular report with the Court.

(5) The Decision Rests Upon Non-Federal Grounds Which Independently Support the Judgment

The Supreme Court of Pennsylvania, by its Opinion dated December 8, 1952, affirmed the judgment of the lower Court upon the following non-federal grounds which independently and adequately support the judgment.

(a) That the petition to vacate alleges the solvency of the Company at June 26, 1947 and at the date of filing of the petition and that petitioner did not meet the burden of proof required of him in this regard under the decisions of the Pennsylvania Courts.

(b) That the Company was in a precarious financial condition on June 26, 1947, its officers having admitted its insolvency; that its affairs were mismanaged, its records manipulated and its financial condition had been fradulently mis-represented by its officers.

(c) That the Company was insolvent as of the date of the filing of the petition to vacate.

(d) That the officers and directors waived all of the requirements of notice under the Insurance Code.

Nowhere in the findings of fact of the lower Court (R. 1672a-1694a) or its conclusions of law (R. 1748a-1753a), all of which were affirmed by the Supreme Court of Pennsylvania, is there any mention of due process of law. This for the reason that pleadings determined the issue. The case was therefore decided by the lower Court upon issues of fact involving non-federal grounds.

It is true that the lower Court, in its opinion, discussed the issue of notice and opportunity to be heard as required by the Insurance Code "bearing in mind that the essential issues raised in this petition to vacate pertain to the sol-

vency of this company". (R. 1736a). But such a discussion is not sufficient to confer federal jurisdiction. *Morrison* v. *Watson*, 154 U. S. 111, 115, 14 S. Ct. 995, 38 L. Ed. 927.

It has been repeatedly held that the Supreme Court of the United States is bound by the findings of fact of a state court, especially when concurred in by the state trial and appellate courts. *In re Buchanan*, 158 U. S. 31, 36, 15 S. Ct. 723, 39 L. Ed. 884; *King* v. *West Virginia*, 216 U. S. 92, 100, 30 S. Ct. 225, 54 L. Ed. 396; *Grayson* v. *Harris*, 267 U. S. 352, 357-358, 45 S. Ct. 317, 69 L. Ed. 652.

(e) The notice and opportunity to be heard provided for by the sections of the Insurance Code in question, as construed by the Pennsylvania Courts, relate only to the issue of solvency which is an issue of fact. Since the findings of fact establish the insolvency of the company, nothing prejudicial to any party occurred by reason of any lack of notice or opportunity to be heard.

The Supreme Court of the United States has no jurisdiction where the cause involves only the proper construction of a state statute. *Quong Ham Wah Co.* v. *Industrial Accident Commission of Calif.*, 255 U. S. 445, 448-449, 41 S. Ct. 373, 65 L. Ed. 723.

(f) That in deciding there was no failure of due process in the entry of the decree, the Court did not uphold the validity of the decree against an attack on federal grounds but discussed "due process" generally. This was made necessary by appellants' failure to be explicit in their statement of questions to be argued on appeal. (See discussion III (2) *supra.*)

It is well settled that there is no federal jurisdiction where the decision of the State Court rests upon one or more grounds which independently and adequately support the judgment or decree.

> "If the same judgment would be rendered by the State Court after we correct its views of federal laws,

EED. THROUGH POOR COPY

our review could amount to nothing more than an advisory opinion." *Herb* v. *Pitcairn,* 324 U. S. 117, 125, 126, 65 S. Ct. 459, 89 L. Ed. 789.

WHEREFORE, the appellees move that the above appeal be dismissed and the judgment of the Supreme Court of Pennsylvania be affirmed.

Respectfully submitted.

D. ARTHUR MAGAZINER,
MAURICE STERN,
DAVID A. SALTZBURG,
JOSEF JAFFE,
Counsel for Appellees.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 229

ROLAND O. HAINES, ET AL., COMPRISING KEYSTONE POLICYHOLDERS' COMMITTEE,

Appellants,

vs.

COMMONWEALTH OF PENNSYLVANIA, ET AL.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

MOTION TO DISMISS APPEAL ON GROUNDS OF JURIRDICTION UNDER RULE 12 (3)

To the Honorable, the Supreme Court of the United States:

William Goldstein, et al., intervenors, one of the appellees, for convenience referred to as the Goldstein Committee, through its attorneys, Maurice Stern, Esquire, of Mayer, Magaziner and Brunswick, David A. Saltzburg, Esquire, of Kolander and Saltzburg, and Josef Jaffe, Esquire, respectfully move that the above appeal be dismissed by

EED. THROUGH POOR COPY

reason of the matters and grounds making against the jurisdiction of your Honorable Court set forth in the annexed statement, and that the judgment of the Supreme Court of Pennsylvania be affirmed.

D. Arthur Magaziner,
Maurice Stern,
David A. Saltzburg,
Josef Jaffe,
Counsel for Appellees.

LE COPY

Office - Supreme Court, U. S.
FILED
NOV 24 1953
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1953

No. 229

ROLAND O. HAINES, *et al.*, comprising Keystone Policyholders' Committee,

Appellants,

vs.

COMMONWEALTH OF PENNSYLVANIA, *et al.*

APPEAL FROM THE SUPREME COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

PETITION FOR REHEARING

ELLIS G. ARNALL,
CLEBURNE E. GREGORY, JR.,
Room 621, The First National Bank Building,
Atlanta, Georgia,

WALTER M. NEWMAN,
Room 1100, The Jones Law Building,
Pittsburgh, Pennsylvania,

Counsel for Appellants.

ARNALL, GOLDEN AND GREGORY,
WALKER AND NEWMAN,
Of Counsel.

BATAVIA TIMES LAW PRINTERS, BATAVIA, N. Y.
RAYMOND R. SMITH, PENNSYLVANIA REPRESENTATIVE,
4 SMITHFIELD ST., PITTSBURGH 22, PA. CO-URT 1-3922

INDEX.

Subject Index.

	PAGE
Petition for Re-hearing	1
Reasons for granting re-hearing	1
The importance of the issue	1
The dismissal of the appeal	5
The non-Federal grounds	7
Conclusion	11
Certificate of Counsel	14
Appendix "A"—Certificate of the Chief Justice of the Supreme Court of Pennsylvania	15
Appendix "B"—Copy of Commonwealth Docket Entries	16

Table of Cases Cited.

Ward v. Board of County Commissioners of Love County, 253 U. S. 17, 40 S. Ct. 419, 64 L. ed. 751	7

Statutes and Other Authorities Cited.

Pennsylvania Insurance Department Act of May 17th, 1921, as amended, P. L. 789:	
Section 213	3
Section 311	3
Section 321	3
Section 502	3
Section 505	3, 9
Section 506	3, 7

BLEED. THROUGH POOR COPY

Supreme Court of the United States

OCTOBER TERM, 1953

No. 229

ROLAND O. HAINES, *et al.*, comprising Keystone Policyholders' Committee,

Appellants,

vs.

COMMONWEALTH OF PENNSYLVANIA, *et al.*

PETITION FOR REHEARING

Appellants pray that this Court grant rehearing of its Order of October 19, 1953, dismissing their Appeal and denying certiorari to review the judgment of the Supreme Court of Pennsylvania in the above entitled case as prayed for in the Appeal filed by Appellants herein.

Reasons for Granting Rehearing

1. *The importance of the issue.*

The Appellants sincerely believe that this Court would not have entered its Order of October 19, 1953 denying certiorari, regardless of its action on the Motion to Dismiss the Appeal, if it had been fully advised of the continuing importance and probable recurrence of the issue.

The deprivation of his property without adequate notice and opportunity for a full hearing guaranteed by the Federal Constitution is an issue of transcendent importance to

BLEED. THROUGH POOR COPY

the individual citizen. It is no less important to this Court which is the historic guardian and protector of Constitutional rights. That reason alone should be sufficient as an inducement to this Court to take jurisdiction, when, as has happened in this case, there are more than 105,000 policyholders of the company scattered throughout the twenty-six States in which the Company did business who have been deprived of their property without due process of law and many of whom, living at a distance from Pennsylvania, had no direct or practical access to its courts. The issue thus has assumed a substantial public import.

But this case has a manifold significance. In it the Supreme Court of Pennsylvania has approved an amazing series of open and apparent violations of the Pennsylvania Insurance Department Law by the then Attorney General, who is now a member of that Court, and by the former Insurance Commissioner, acting in the name of the Commonwealth, which effectively denudes that law of the statutory safeguards essential to due process. Although the record indicates that the former Attorney General as a member of the Supreme Court of Pennsylvania did not participate in the consideration or decision of this case by the Pennsylvania Supreme Court, who can deny that his mere presence on the Court when his prior actions are being attacked must have caused his influence to be felt, as reflected in the fact that when the petition for appeal to this Court was presented to the Chief Justice of the Supreme Court of Pennsylvania it was denied by a *per curiam* order of the Court. Such violations of the Pennsylvania Insurance Department Act, together with other conduct apparent from the record and directed to the same result are not only consistent with but strongly indicative of a studied and deliberate effort to deprive the Company and its members of a fair opportunity to resist the dissolution decree.

The examination of the Company which was commenced on May 21, 1947 and completed on June 23, 1947 did not establish a proper claim liability on an individual case basis as required by Section 311 of the Pennsylvania Insurance Department Act. (R. 1510a.)

The hearing required by Section 213 of the Pennsylvania Insurance Department Act before the filing of the report of examination was never granted, nor was a copy of the report of examination containing the charges made against the company made available to the company until June 25, 1947. (R. 1765a.)

The notice required by Section 321 of the Pennsylvania Insurance Department Act to make good within sixty (60) days the impairment in capital or reserves was never given. (R. 231a, 238a.)

The notice which was directed to the president of the company on June 14, 1947, before the report of examination had been typed, was of a hearing before the Attorney General under the provisions of Section 502 of the Pennsylvania Insurance Department Act. The hearing examiner only had the authority to hear and recommend to the Attorney General whether he should proceed against the company under Section 505 of the Act for possession and rehabilitation, or under Section 506 for possession and liquidation. *No rule to show cause was issued* nor a full hearing had as required by Section 506 before the dissolution decree was entered.

On June 4, 1947 shortly after the examination had commenced the Company was instructed not to write any more non assessable policies and to cease writing any new or renewal polices until an assessable policy was approved by the Insurance Commissioner. (R. 823a.)

On June 16, 1947 before the report of preliminary examination was completed the company's license was formally suspended. (R. 878a, 879a.)

Liquidation was first suggested by the Deputy Attorney General *without prior notice* to the company at the hearing on June 25, 1947. (R. 1776a.)

The Joinder by the Attorney for the Company which was *limited to the possession* of the Company by the Insurance Department for sale or rehabilitation and which was so understood by the Deputy Attorney General representing the Insurance Commissioner was *used by him without further notice for the purpose of obtaining a dissolution decree* at an informal conference in Chambers on June 26, 1947 at which the Company was not represented. (R. 280a; 283a; 285a; 1951a.)

Thus, neither the company, its directors, officers or counsel were given notice that the Deputy Attorney General, acting as counsel to the Insurance Commissioner, would use this limited joinder to obtain a decree of dissolution, nor did they consent to such action which deprived the company of notice of a hearing on the suggestion and an opportunity to be heard in accordance with the requirements both of the Pennsylvania statutes and the 14th Amendment to the Federal Constitution.

The Insurance Department Act of the large and populous Commonwealth of Pennsylvania will continue to have frequent application. Now that the Notice and Hearing provisions of that Statute have been designated as "technical requirements" by the Supreme Court of Pennsylvania a premium has been placed upon the summary dissolution of an insurance company by a corrupt, over-zealous or timid Commissioner against which action there apparently

is no practical defense under Pennsylvania law and recourse must be had to the due process provision of the 14th Amendment to the Federal Constitution. The question will continue to be one of large practical importance in the administration of the Pennsylvania Insurance Department law until the issue of whether that Act as so construed and applied violates due process of law is met and decided by this Court—as the issue must ultimately be met and decided, for citizens will not remain silent while their property is seized under such despotic laws. Until that time due process will continue to be a mockery in the administration of the Pennsylvania Insurance Department Act.

2. *The Dismissal of the Appeal.*

By its order of October 19, 1953, this Court dismissed the appeal for want of jurisdiction, citing 28 U. S. C. 1257(2). That action must have been predicated either upon the belief by this Court that the validity of the Pennsylvania Insurance Department Act as construed and applied was not drawn into question on the grounds of its being repugnant to the Federal Constitution or on the belief that the State court decision was supported by substantial non-Federal grounds. Either belief is untenable.

Since that order was entered, appellants have been furnished a certificate by Honorable Horace Stern, Chief Justice of the Supreme Court of Pennsylvania that the Pennsylvania Court gave full consideration to the question whether appellants had been denied the fundamental requirements of due process prescribed in the 14th Amendment of the Constitution of the United States, through failure to receive proper notice of the proceedings in the lower court. (Appendix A.) As the Pennsylvania Su-

BLEED. THROUGH POOR COPY

preme Court specifically found that the Pennsylvania Statutes did not require any more notice than the officers and directors of the company actually received, the certificate affirms that the Court determined the validity of the statute under the 14th Amendment and resolves any ambiguity in the decision on that question.

The Supreme Court of Pennsylvania also acknowledged that the issue of the validity of the statute under the due process provision was raised and actually decided it. It said:

> "In order to determine whether the decree of the court below dated June 26, 1947, was valid, *it is necessary first to consider (1) the provisions and requirements of the Insurance Code of May 17, 1921, and (2) the constitutional requirement of due process, i. e. notice of a hearing and an opportunity to be heard. These are so closely related that they will be considered together.*" (Emphasis supplied.)

The obvious purpose of the Court expressed in that language was to test the statute, as applied, by the requirements of due process in response to Question No. 1 of the "Statement of Questions Involved" in Appellants' Brief (Brief p. 2) that the decree was either a violation of the applicable statutes or a denial of due process of law. The Court did not accede to the insistence that the statute as applied was invalid but held that the notice and hearing provisions of the statute were "technical requirements of the Insurance Code" and applied and enforced the statute as thus construed, hence necessarily affirming its validity. In addition, the Court specifically said:

> "The reasons why this issue was not previously raised must be obvious; there was adequate notice and ample opportunity to be heard in June 1947 and consequently there was no failure of due process."

The Court also entertained and considered until April 4, 1953 a Motion for Reargument of its decision of December

8, 1952 in which the principal ground relied upon was the validity of the statute as construed and applied under the due process provision of the Federal Constitution.

3. *The non-Federal Grounds.*

Non-Federal grounds which are plainly untenable may not be used to defeat the jurisdiction of the Supreme Court.

Ward v. Board of County Commissioners of Love County, 40 S. Ct. 419, 64 L. ed. 751.

The Pennsylvania Supreme Court asserts a waiver by the company of the rule to show cause and full hearing required by Section 506 of the Statute and by due process. As this is a question of fact, the finding by the Court is not only wrong but is plainly untenable if it is not supported by any evidence in the record.

In support of its position the Pennsylvania Supreme Court cites and relies upon facts which did not occur. The attorney for the Company did not on June 26, 1947, the day of the Court's decree, waive in writing the issuance of an order or rule to show cause and notice, and consent in writing to the Court's order delivering possession of the Company to the Insurance Commissioner as stated by the Pennsylvania Supreme Court. The Company was not represented when the dissolution decree was obtained on June 26, 1947. (R. 280a.) *The only joinder and consent of the attorney for the Company was the limited one,* also referred to by the Supreme Court of Pennsylvania, as being signed by the attorney for the company on June 25, 1947. (R. 293a, 297a.) This was the one, filed on June 26, 1947 with the suggestion, to which the docket entries refer. (R. 1947a.) *That this writing did not contemplate a joinder in or consent to liquidation proceedings cannot be disputed.* It provided:

> "And Now, to-wit, June 25, 1947, issuance of the Rule in the within case, and notice of the same, is hereby waived, service of the same is hereby accepted, and consent is given to the granting of the relief prayed for in the within suggestion *to the extent of the authorization* contained in the resolution of the Board of Directors of Keystone Mutual Casualty Company, adopted June 24, 1947, copy of which is hereto attached." (R. 1839a.) (Emphasis supplied.)

The resolution attached to the joinder and by which it was limited provided:

> "Now, Therefore, upon motion of N. P. Kann, seconded by S. H. Hartman, be it resolved that the Insurance Commissioner of the State of Pennsylvania is hereby requested to immediately take charge of the affairs of the Company in order to conserve the assets of the Company for the benefit of all concerned; and it is further resolved that in order to facilitate any action of any person or company to purchase or rehabilitate the Company, the resignation of all of the officers and directors having been submitted to the Company are accepted and are herewith enclosed.
>
> "And Be It Further Resolved, that N. P. Kann is hereby authorized and empowered to join with the Insurance Commissioner in behalf of the Keystone Mutual Casualty Company in any legal action necessary for the Insurance Commissioner to take charge of the Company." (R. 1840a.)

It is clear and definite that the intent of the Board of Directors is found in the words "take charge", "conserve the assets" and "to facilitate any action * * * to purchase or rehabilitate the Company." The generic meaning of these words precludes any idea of liquidation. The Board of Directors, having been denied notice of the charges and an opportunity to disprove them, and faced with criminal charges against three of the officers of the company, were forced to consent to the possession of the company by the

Insurance Commissioner under Section 505 of the Act until the condition of the Company could be definitely established. The resolution is susceptible of no other interpretation.

Notwithstanding that the resolution was in evidence at the hearing before one of the Deputy Attorney Generals sitting as a hearing examiner on June 25, 1947 (R. 1762a), that the attorney for the company repeatedly stated there would be no relaxation of efforts to rehabilitate the company. (R. 1774a, 1770a), that the only notice given was of a hearing under Section 502 of the Statute (R. 1760a), and that there was no prior notice to the company of his intention to do so, Deputy Attorney General Umstead, counsel to the Insurance Commissioner, at the close of the hearing on June 25, 1947, proposed to put the company into the hands of the Insurance Commissioner for liquidation. (R. 1776a.) And notwithstanding that he as counsel for the Insurance Commissioner fully understood the limited scope of the joinder signed by the Attorney for the Company, he used it as a vehicle to obtain the dissolution decree. He testified:

> "A. By that acceptance of service and as I note this, the copy of the resolution shows the authority that Mr. Reich had, and his authority is limited to the fifth paragraph of the exhibit on page nine. • • •
>
> "Q. You will agree with me there is nothing in that resolution that authorized the liquidation of the Company, is there? • • •
>
> "The Witness: No. Mr. Reich said the farthest he can agree is to go along on having the Insurance Commissioner take over, because that is what the resolution says, 'and that is what my authority is'. I said, 'Can we agree to this decree we have drawn up?' Then in answer, 'First I can't agree to the decree; the best we can do is accept service and agree to the terms of the resolution that was given by my authority." (R. 298a, 299a.)

"*Q. Did Joseph Reich* or any representative of the company either urge or agree that this company be liquidated? * * *

"The Witness: They did not, quite to the contrary, they were insistent they could get more money. Particularly Reich, he was insistent he could get more money and put himself and the company in good shape and he said he had been trying to do that for a considerable period of time. *He had no authority to agree to anything other than the Insurance Commissioner to take over, and hold until such time as he could accomplish that purpose.* On behalf of the Insurance Commissioner, my client, I felt differently, in view of the report of the examiner. I made the application under 506 of the Code for liquidation." (R. 302a. 303a.) (Emphasis supplied.)

How could the Supreme Court of Pennsylvania misconstrue this limited joinder which was so thoroughly and precisely explained by the undisputed testimony of this adverse witness. It could not and did not. It recognized the restrictions of this joinder in its opinion but asserted that there was another one entered on June 26, 1947, the day of the court's decree. There is no evidence in the record to support such an assertion. *The ground of waiver is wholly untenable.*

The Pennsylvania Supreme Court also suggests that neither the company nor its directors nor officers nor policyholders nor the intervenors appeared or made any objection to the proposed liquidation of the company or to the decree below for a period of over 3½ years. The record refutes that statement as shown by the docket entries, a copy of which are attached hereto as Appendix B.

The dissolution decree was entered June 26, 1947. On June 2, 1948, the Matlack Committee of policyholders was given leave to intervene and sought the reinstatement and rehabilitation of the Company. (R. 1948a.) On February 21, 1950, the Court granted the Matlack Committee per-

mission to withdraw as intervenors (R. 1948a) and on March 10, 1950, the petition of the present appellants' committee of policyholders was filed, as was a petition for the rehabilitation of the Company. (R. 1948a, 1949a.) The right of appellants to intervene was contested, but the Pennsylvania Supreme Court on November 22, 1950, held such intervention to be timely and that appellants were not guilty of laches. (Statement of Jurisdiction, Appendix "B".) The remittitur was received December 5, 1950 (R. 1a). The present proceeding by the succeeding Attorney General and Insurance Commissioner to vacate the dissolution decree was filed December 19, 1950 (R. 1a). It is apparent from these facts, and from a review of the docket entries (Appendix B) that during the entire proceedings from June 2, 1948, there has been a committee of policyholders as intervenors in the case seeking to prevent the dissolution of the company; *and the 3½ years delay referred to by the Pennsylvania Supreme Court is chargeable to the Court of Common Pleas; not to appellants. The* Pennsylvania Supreme Court itself found appellant's intervention to be timely. *Laches as a non-Federal ground is non-existent.*

Conclusion

Keystone Mutual Casualty Company and its policyholders were deprived of their corporate existence and property without due process of law.

There was *no notice* whatsoever, much less adequate notice, that a liquidation order would be sought. There was no full hearing, indeed no hearing at all, and not even an opportunity for hearing afforded to resist this precipitous taking of corporate life and property.

Refusal to accept jurisdiction would leave recorded precedent of taking without due process of law the life and

BLEED. THROUGH POOR COPY

millions of dollars worth of property of an insurance company whose operations, members, and owners covered more than half of the entire United States. The record leaves no doubt that the question of due process and therefore the federal constitutional question was paramount and controlling. The State Supreme Court has said so. It leaves no doubt that there were no non-federal grounds to support the decision: *neither was there consent to or waiver of notice of the liquidation proceedings, nor were there laches.* In the final analysis the case turned solely upon consideration of the constitutional requirement of due process.

Acceptance of jurisdiction would be consistent with the time-honored pronouncements of this highest Court in the land that neither life nor property can be taken without due process of law. Such acceptance of jurisdiction would certainly not be futile. A reversal of the judgment of the Pennsylvania Supreme Court, required by the basic concepts of due process, would impose no undue burdens upon the courts of that Commonwealth. *There has not in fact been any liquidation. No rights of third parties have intervened* to be prejudiced by a reversal or by any ultimate restoration of the Company's assets to its rightful owner. The insolvency of the Company, and the charges made by the Insurance Commissioner were never judicially established prior to the entry of the dissolution decree or by that decree. The hearing examiner had no authority to make judicial findings of fact and indeed made none. There was no hearing by the Common Pleas Court before the dissolution decree was entered, establishing insolvency. With the burden of proof properly cast, *the solvency of the Company as of the date it was ordered liquidated must be presumed.* The Court of Common Pleas designated as unreliable and undependable the report of examination

upon which liquidation decree was based (R. 1681a, 1713a, 1716a, 1722a). And the most recent report of examination of the Company showed it to be solvent as of June 30, 1950 (R. 1853a-1868a). Consequently even if there should be a reversal and even if there should ultimately be a restoration of assets to this Company which has not been liquidated, which must be presumed solvent at the time it was ordered liquidated, and which was shown solvent at its most recent examination, no undue burden would be imposed upon the Pennsylvania courts.

Far-reaching financially, geographically, and particularly as recorded precedent for taking corporate life and property without the fundamental requirements of adequate notice and opportunity to be heard which this Court has recognized as due process, the judgment of the Pennsylvania Supreme Court requires hearing and careful review by this Court as the last bulwark against such invasion and disregard of constitutional rights.

For the reasons set forth it is respectfully prayed that rehearing of the Order of October 19, 1953, dismissing the appeal and denying certiorari, be granted, and that this Court take jurisdiction and review the judgment of the Supreme Court of Pennsylvania.

ELLIS G. ARNALL,
CLEBURNE E. GREGORY, JR.,
WALTER M. NEWMAN,
Counsel for Appellants.

ARNALL, GOLDEN AND GREGORY,
WALKER AND NEWMAN,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 229

—o—

ROLAND O. HAINES, *et al.*, Comprising Keystone Policyholders' Committee,

Appellants,

vs.

COMMONWEALTH OF PENNSYLVANIA, *et al.*

—o—

The undersigned counsel for Appellants hereby certifies that the foregoing Petition for Rehearing is presented in good faith and not for delay, is based in part upon an intervening circumstance of substantial effect, and insofar as applicable to the denial of certiorari when the papers are treated as a petition for writ of certiorari, is restricted to the grounds specified in Rule 33 (2).

CLEBURNE E. GREGORY, JR.,
Counsel for Appellants.

Appendix "A"

SUPREME COURT OF PENNSYLVANIA

JUDGES' CHAMBERS

Philadelphia, Pa.
October 28, 1953.

—o—

In re Keystone Mutual Casualty Company, Appeal of Keystone Mutual Policyholders' Committee, Supreme Court of Pennsylvania No. 27 May Term 1952 (reported 373 Pa. 105, *sub nomine* Commonwealth *ex rel.* Chidsey v. Keystone Mutual Casualty Company); United States Supreme Court No. 229 Oct. Term 1953.

—o—

This is to certify that the Supreme Court of Pennsylvania, in affirming the order of the Court of Common Pleas of Dauphin County in this case, gave full consideration to the question whether appellant had been denied the fundamental requirements of due process prescribed in the 14th Amendment of the Constitution of the United States, through failure to receive proper notice of the proceedings in the lower court. As a result of such consideration the Court decided that appellant had not been denied due process in that or any other respect.

S/ HORACE STERN,
Chief Justice.

Appendix "B"

COPY OF COMMONWEALTH DOCKET ENTRY

—o—

COMMONWEALTH OF PENNSYLVANIA *ex rel.* I. McKenn Chidsey, Attorney General,

v.

KEYSTONE MUTUAL CASUALTY COMPANY.

—o—

June 26, 1947, On suggestion filed by Attorney Gen'l. of Commonwealth of Penna, it is ordered, adjudged and decreed that the business of Keystone Mutual Casualty Co. be closed and Ins. Commr. of Penna directed to take possession; that said Keystone Mutual Casualty Co. be dissolved, its charter vacated and its corporate existence ended, etc. see final order and decree filed.

June 26, 1947, Issuance of rule and notice of same waived, and service accepted and consent given to granting of relief, by Joseph H. Reich, atty for Keystone Mutual Cas. Co., filed.

June 26, 1947, Appearance of John A. Skelton, Special Deputy Atty. Gen'l. for James F. Malone, Ins. Commr. filed.

June 26, 1947, Appearance of Joseph H. Reich for N. P. Kann, Atty-in-fact for Keystone Mut. Cas. Co. filed.

June 2, 1948, On petition filed leave granted Keystone Mut. Cas. Co. Policyholders Protective Committee to intervene, see order filed.

June 2, 1948, On motion filed Insur. Commer of Pa. directed to file an answer to petition of this date by August 1, 1948, see order filed.

July 22, 1948, Answer of Ins. Commr to Petition of Policyholders Protective Committee for leave to intervene filed.

Sept. 23, 1948, Stipulation for order of Evaluation of claim liability filed.

Sept. 23, 1948, Order of Court for evaluation of claim liabilities of Deft. Co. filed.

Dec. 23, 1948, Evaluation of claim liabilities filed.

Feb. 28, 1949, Supplemental report on evaluation of claim liabilities filed.

Feb. 21, 1950, On petition filed leave is granted Keystone Mutual Cas. Co. Policyholders Protective Committee to withdraw as intervening party deft., with leave to make further appearance at a later date for requesting an appropriate allowance for expenses and counsel fees of said committee, see order filed.

March 10, 1950, On petition filed rule granted to show cause why Roland O. Haines, Edward Chadderton, Edmund J. Dwyer, Harold Kane and John D. O'Neil should not be permitted to intervene as parties deft, retble 15 days.

March 10, 1950, Petition for Rehabilitation filed.

March 21, 1950, Answer to petition to intervene filed by R. B. Umsted, Dp Atty Gen'l.

March 31, 1950, Case argued before Judges Rupp, Woodside, Smith, Neely and Richards.

March 31, 1950, Brief of Com'th filed.

Apr. 14, 1950, Brief of Intervenor filed, record to court.

May 9, 1950, Appearance of Carl F. Chronister, Sherman T. Rock, Charles Danby and Reed, Shaw, Smith & McClay for Mutual Cas. Co. Policyholders Protective Committee, filed.

BLEED. THROUGH POOR COPY

May 22, 1950, Petition of intervention disallowed and leave granted to amend within 20 days, petition of intervention and pleading to be attached thereto, see opinion filed.

June 8, 1950, Petition and plan of rehabilitation filed.

June 8, 1950, Amendment to petition to intervene and petition and plan of rehabilitation filed, with order of court setting hearing for June 26, 1950 at 2 P. M.

June 17, 1950, Appearance as *aminus curiae* of Josef Jaffe, Esq., and Maurice Stern, Esq., filed.

June 26, 1950, Claude A. Hanley, Ancillary Receiver of Keystone Mut. Cas. Co. in State of Maryland is admitted as party Deft as per petition filed.

July 10, 1950, On petition filed Ins. Commr. of Pa. authorized to pay from assets of Deft. Co. claim evaluators, etc. requisite to make an evaluation of all assets and liabilities and prepare current balance sheet, see order filed.

July 25, 1950, Petition of Max J. Berks and Irene Perks for leave to intervene ordered filed.

July 26, 1950, Amended petition to intervene is disallowed, see opinion filed.

Aug. 25, 1950, Exceptions (2) ordered on Argument list.

Sept. 8, Certiorari *sur* appeal from Supreme Court by Ins. Commr. filed, No. 21 May T. 1951.

Sept. 8, 1950, Certiorari *sur* appeal from Supreme Ct by Attorney Gen'l, No. 20 May T 1951.

Sept. 8, 1950, Certiorari *sur* appeal from Supreme Ct by Keystone Mutual Policyholders Committee to No. 22 May T. 1951, filed.

Dec. 5, 1950, Remittitur received from Supreme Court reversing decree of this Court remitting record for entry of appropriate decree in accordance with opinion of Supreme Court.

Dec. 6, 1950, Prayer of Petition of Roland O. Haines for leave to intervene in within proceedings in their own behalf as parties defendant and in behalf of all other holders of policies issued by Keystone Mutual Cas. Co. is granted in accordance with opinion of Supreme Court, Pa, see order filed.

Dec. 15, 1950, On Petition filed Rule granted to show cause why Max J. Perks, Irene Perks *et al* should not be permitted to intervene on their behalf & on behalf of all creditors other than policyholders & the U. S of A. Retble 20 days see order filed.

Dec. 18, 1950, Upon motion of Ins. Commr & Atty Gen'l a Rule is granted upon parties of record to show cause why decree of dissolution of June 26, 1947 should not be vacated & why Ins. Commr. should not be directed to prepare a plan of rehabilitation see decree filed.

(R. 1947a-1950a, 1a)

E COPY

FILED
DEC 4 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1953 No. 229

ROLAND O. HAINES ET AL., Comprising
Keystone Policyholders' Committee,
Appellants

v.

COMMONWEALTH OF PENNSYLVANIA ET AL.

Appeal from the Supreme Court of Pennsylvania, Middle District

RESPONSE TO PETITION FOR REHEARING

D. ARTHUR MAGAZINER MORRIS W. KOLANDER
MAURICE STERN DAVID A. SALTZBURG
JOSEF JAFFE
1528 Walnut Street, Philadelphia 2, Pa.
BREWSTER WICKERSHAM,
503 Keystone Building, Harrisburg, Pa.
Counsel for Appellees

THE LEGAL INTELLIGENCER, 10 S. 37TH ST., PHILA. 4

BLEED THROUGH POOR COPY

INDEX

	Page
Response to Appellants' Petition for Rehearing	1
The Attack on the Supreme Court of Pennsylvania	1
The Dismissal of the Appeal	4
The Non-Federal Grounds	6
Conclusion	9
Appendix "A"—State of Points to Be Argued on Appeal	11

TABLE OF CASES CITED

Anderson National Bank v. Luckett, 321 U. S. 233	8
Commonwealth v. Ministers Protective Society, 294 Pa. 6	7
Penn General Casualty Company v. Commonwealth of Pennsylvania, 316 Pa. 1; 294 U. S. 189	7

RESPONSE TO APPELLANTS' PETITION FOR REHEARING

Appellees, William Goldstein, et al., Intervenors, for convenience referred to as the Goldstein Committee, and Appellee, Claude A. Hanley, Ancillary Receiver in the State of Maryland, pray that this Court deny Appellants a rehearing of the Order dated October 19, 1953, dismissing their Appeal and denying Certiorari for the reasons hereinafter set forth. For convenience, the response follows, for the most part, the corresponding averments of the petition without regard to their order of importance.

1. The Attack on the Supreme Court of Pennsylvania

Under Rule 33, a petition for rehearing of an Appeal must briefly and distinctly state its grounds, and rehearing of an order denying certiorari must state grounds which are confined to intervening circumstances of substantial or controlling effect, or, being substantial, have not previously been presented.

A vicious and unwarranted attack upon the integrity of the Supreme Court, the office of the Attorney General and the office of the Insurance Commissioner of a great Commonwealth historically noted for the development of jurisprudence and the administration of justice, is not a ground for rehearing no matter how substantial the attack. Counsel for appellees feel constrained, as officers of the Court, to challenge this conduct even at the risk of diverting attention from the issue at bar—a reaction and result which was obviously intended by appellants.

Appellants were granted an enlargement of the time within which to file their petition for rehearing upon a

BLEED THROUGH POOR COPY

motion which represented that they would obtain a certificate from the Chief Justice of the Supreme Court of Pennsylvania which would satisfy the requirements of 28 U. S. C. 1257(2). Appellants were unable to obtain such a certificate and their motion for enlargement of time was, therefore, based upon representations which were without foundation. However, their disappointment does not justify impugning the integrity of the Supreme Court and the public officials of the Commonwealth of Pennsylvania as appellants have by direct assault and thinly veiled innuendoes on page 2 of their petition, as follows:

> "But this case has a manifold significance. In it the Supreme Court of Pennsylvania has approved an amazing series of open and apparent violations of the Pennsylvania Insurance Department Law by the then Attorney General, who is now a member of that Court, and by the former Insurance Commissioner, acting in the name of the Commonwealth, which effectively denudes that law of the statutory safeguards essential to due process. Although the record indicates that the former Attorney General as a member of the Supreme Court of Pennsylvania did not participate in the consideration or decision of this case by the Pennsylvania Supreme Court who can deny that his mere presence on the Court when his prior actions are being attacked must have caused his influence to be felt, as reflected in the fact that when the petition for appeal to this Court was presented to the Chief Justice of the Supreme Court of Pennsylvania it was denied by a per curiam order of the Court. Such violations of the Pennsylvania Insurance Department Act, together

with other conduct apparent from the record and directed to the same result are not only consistent with but strongly indicative of a studied and deliberate effort to deprive the Company and its members of a fair opportunity to resist the dissolution decree."

The foregoing statement is brash impertinence subject to the strongest possible censure. It is all the more to be regretted because of the extreme courtesy extended by the State Courts to the numerous and different counsel employed by appellants from time to time. Appellants were first permitted to intervene in the proceedings. They were then permitted to appeal from the decision of the Common Pleas Court of Dauphin County notwithstanding that they were not the petitioners in the subject matter; and notwithstanding that the Insurance Commissioner, as petitioner, notified the Supreme Court of Pennsylvania that he did not intend to appeal and that he saw no purpose to disturbing the Order of the lower court. Finally, at their request, the Supreme Court of Pennsylvania held the record for a period of ninety days in order to permit appellants to file a petition for leave to appeal to the Supreme Court of the United States.

Justice Thomas McKeen Chidsey, Attorney General at the time the original order of liquidation was entered and, therefore, technically a party to the record, withdrew from all consideration of the case in accordance with time honored custom. Yet, appellants charge that his very presence on the bench influenced the Supreme Court of Pennsylvania to deny their petition for leave to appeal to this Court by means of a per curiam order. It is a matter of conjecture whether appellants are critical of the refusal to allow the appeal, as such, or the fact that it was accom-

plished by means of a per curiam order. In either event, it is assumed that appellants are likewise critical of the Supreme Court of the United States for dismissing their appeal, also by means of a per curiam order.

Appellants discuss other matters under the title, "The Importance of the issue", all of which have been fully brought to the attention of this Court previously. They will be briefly discussed at another point in this response.

2. The Dismissal of the Appeal

Since the order of this Court dismissing the appeal for want of jurisdiction under 28 U. S. C. 1257(2), appellants obtained a certificate from the Chief Justice of the Supreme Court of Pennsylvania attached as Appendix "A" to their petition for rehearing. This certificate merely re-affirms what was already included in the Opinion of the Supreme Court of Pennsylvania; that appellants were not denied due process through failure to receive proper notice of the liquidation proceedings. In no respect does the certificate supply the requirement that the validity of a state statute as being repugnant to the Constitution or the laws of the United States must have been drawn in question.

Appellants' motion for an enlargement of time within which to file its petition for rehearing specifically states that they would furnish a certificate to the effect that the Federal question required to give this Court jurisdiction under 28 U. S. C. 1257(2) was actually considered and decided by the Supreme Court of Pennsylvania and was necessary to a determination of the case. It is obvious that the basis of appellants' petition, as represented by them,

has not been established and for this reason alone the petition for rehearing should be dismissed.

Appellants' attempt to argue that "the certificate affirms that the Court determined the validity of the Statute under the 14th Amendment and resolves any ambiguity in the decision on that point". This is wishful thinking. Counsel for appellants have been somewhat less than candid in making this argument since they did endeavor to obtain a certificate which might supply the deficiency, but they were unable to do so because no state statute was ever drawn in question as being repugnant to the Federal Constitution. The certificate which was issued was intended merely to confirm what had already been stated in the Opinion of Justice Bell.

Appellants have included several other matters in their discussion of this subject which have already been adequately argued previously. One statement, however, warrants a reply. On page 6 of appellants' petition it is stated that "The Court also entertained and considered until April 4, 1953 a Motion for Reargument of its decision of December 8, 1952 in which the *principal ground* relied upon was the validity of the statute as construed and applied under the due process provision of the Federal Constitution."

The reargument of the case must necessarily have been dependent upon the assignments of error and briefs already in possession of the Supreme Court of Pennsylvania. Reference to the appellants' Statement of Points to be Argued on Appeal (set forth in Appendix "A" attached hereto) indicates that appellants relied almost exclusively upon non-federal grounds.

3. The Non-Federal Grounds

The certificate issued by the Chief Justice of the Supreme Court of Pennsylvania leaves unchanged the many non-federal grounds upon which the decision was predicated.

The appellants presented their case to vacate the decree of dissolution upon the equitable doctrine of mistake of fact. There was no related Federal question. They joined with a succeeding Attorney General and Insurance Commissioner in the filing of an unverified petition, in which it is alleged that the decree of dissolution was entered under a mistake of fact in that the Company was solvent at the time of the decree and remained solvent thereafter. Nothing was mentioned about lack of notice or an absence of due process. (R. 13a)

Through one of their own witnesses, the present Insurance Commissioner, it was established by means of a Federal Income Tax Return filed on March 15, 1951, that the Company, as of December 30, 1950, was insolvent by more than $1,500,000.

All counsel agreed at the trial of the case that the sole issue was solvency (R. 200a, 201a, 210a, 220a, 223a). Further, appellants conceded that the Company should be in the hands of the Insurance Commissioner under Section 502 of the Pennsylvania Insurance Department Act. (R. 203a-205a) By admitting the application of Section 502, they conceded that the Company was in a hazardous condition and that every requirement of notice and opportunity to be heard pursuant to that section had been met. That the Company was subsequently ordered into liquidation under Section 506 is consistent with the long established interpretation of the Insurance Department Act by

the Supreme Court of Pennsylvania. *Commonwealth vs. Ministers Protective Society*, 294 Pa. 6, 10, 16 (1928). The Supreme Court of the United States also recognized the integrity of the correlated Sections (502, 503, 504 and 506) in connection with taking possession and liquidating an insurance company. *Penn General Casualty Company vs. Commonwealth of Pennsylvania*, 294 U. S. 189 (1935). All of this has already been fully presented to this Court in Appellees' Statement Opposing Jurisdiction and Motion To Dismiss (Pages 15-17).

The issue of due process was raised only as a last resort after appellants failed to prove the allegations of the original petition and is only intended to becloud the issue. Sections 213, 311 and 321 of the Insurance Department Act obviously relate to routine regulations covering the supervision of going insurance companies.

The Company and all of its officers received more than adequate notice of all of the proceedings. The Company was represented by counsel who entered a general appearance in the litigation. Every opportunity to restore the deficit was afforded and the Company admitted its inability to do so. The officers admitted insolvency and criminal falsification of records. All of this is recorded in greater detail, with specific reference to the record, in appellees' Statement Opposing Jurisdiction.

Due process has never meant that every one who may be affected by a decree need have notice and be a party to the proceedings at every stage. The Company and its officers received adequate notice. Policyholders are not entitled to a special type of notice under the statute, separate and apart from the notice to the Company. Surely, it is not to be expected that approximately 105,000 policyholders were to receive notice and given an opportunity to be heard

while the assets were being dissipated. The due process of law clause requiring notice and an opportunity to be heard follows a rule of reason *Anderson National Bank vs. Luckett*, 321 U. S. 233. Curiously enough, appellants concede this to be the law because they admit that the Insurance Commissioner had the right to take possession of the Company under Section 502 pursuant to the very notices which they claim to be inadequate for the purposes of Section 506.

Appellants take it upon themselves to speak for 105,000 policyholders of the dissolved company when their own petition for intervention indicates that they represent only five policyholders (R. 1975a). As opposed to this, the Insurance Commissioners of two sister states joined with the Insurance Commissioner of Pennsylvania in seeking the liquidation of the Company. Claude A. Hanley, Ancillary Receiver for the Keystone Mutual Casualty Company in the State of Maryland, and one of the appellees joining in this Response, represents thousands of policyholders, claimants and creditors of that state. The Goldstein Committee, the other appellee, represents policyholders and creditors having claims in excess of one-half million dollars (R. 90a).

The policyholders have a vested right in the Company only to the extent that its assets exceed its liabilities. The provisions of the Pennsylvania Insurance Department Act were meant not only for the benefit of policyholders. Under Section 502, which appellants agree was an appropriate section, such relief is authorized "as the nature of the case and the interests of its policyholders, creditors, stockholders, or the public may require".

As a matter of fact, under the law of Pennsylvania,

there are no policyholders of a mutual insurance company when the policies have expired. All of the policyholders became creditors of the dissolved company and their rights are adequately protected in the fund to be secured upon liquidation. (See analysis of the law in the Opinion of Neely, J. R. 1733a.)

If the policyholders were entitled to an opportunity to be heard it could only be for the purpose of establishing the solvency or insolvency of the Company. Each and every policyholder who expressed any interest in the subject matter was permitted to intervene in the proceedings either independently or through committees (See Docket Entries —Appendix "B" of Appellants' Petition).

The certificate attached as Appendix "A" to appellants' Petition leaves undisturbed the several non-federal grounds which independently and adequately support the judgment of the Supreme Court of Pennsylvania, all of which is more specifically detailed in pages 20-22 of appellees' Statement Opposing Jurisdiction.

Conclusion

Justice will best be served by a termination of the litigation. The appellants have delayed the administration of justice by a belated contention that the validity of the statute in Pennsylvania under the 14th Amendment is the important issue, but the refusal of the Chief Justice of the Supreme Court of Pennsylvania to give the appellants the certificate which would meet the requirements of Section 28 U. S. C. Section 1227(2) clearly establishes that the validity of the statute was never drawn in question.

The litigation in this matter has been protracted and extended beyond reason by the appellants who have never

been able to establish a basis for their attack upon the decree of dissolution. Twenty-six states of the United States have accepted the decree of dissolution entered by the Courts of the Commonwealth of Pennsylvania. Full faith and credit has been given to that decree in all of the states. Assets have been collected and turned over to the Insurance Commissioner of the Commonwealth of Pennsylvania as Statutory Liquidator. Simple justice would require that the rights of the claimants to the fund be adjudicated and final distribution be made to the creditors entitled.

It is therefore respectfully requested that rehearing of the Order of October 19, 1953 dismissing the appeal and denying certiorari, be refused, and that the record be returned for compliance with the decision and Order of the Courts of the Commonwealth of Pennsylvania.

D. ARTHUR MAGAZINER
MAURICE STERN
DAVID A. SALTZBURG
JOSEF JAFFE
MORRIS W. KOLANDER
BREWSTER WICKERSHAM
Counsel for Appellees.

APPENDIX "A"

STATEMENT OF POINTS TO BE ARGUED UPON APPEAL

1. At the time of the decree of dissolution, when the company was declared to be insolvent, was the company in fact solvent and has the company been solvent from that date to the present time?

2. Do the findings of fact made by the Court below concerning the incorrectness of the reserve for liability and Workmen's Compensation losses and the reserve for advance premium deposits as contained in the Linder Report and as testified to by Linder on the stand, together with its findings, that the finances of Keystone Mutual Casualty Company were in an unsound condition on June 26, 1947 and until the time of the Hearing in this case, from the standpoint of the policyholders, the creditors and the public, disclose manifest error in their deduction?

3. Was Goldstein's Exhibit No. 5, the income tax return filed in behalf of the Company by the Insurance Commissioner for the year 1950, not properly received in evidence?

4. Was the decree of dissolution of the Court below, entered on June 26, 1947, ordering the Insurance Commissioner to liquidate the Keystone Mutual Casualty Company, entered under a material mistake of fact?

5. Did the decree of dissolution, entered on June 26, 1947, deprive the company and its policyholders of property without due process of law?

6. Should the decree of dissolution, entered on June 26, 1947, be vacated, and a decree entered returning the Company's property to the custody of the Insurance Commissioner with provisions permitting its restoration to private management and operation?

REED, SMITH, SHAW & MCCLAY

WALKER & NEWMAN

Counsel for Appellant.

No. 229. HAINES ET AL., COMPRISING KEYSTONE POLICYHOLDERS' COMMITTEE, *v.* PENNSYLVANIA ET AL. Appeal from the Supreme Court of Pennsylvania, Middle District. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of jurisdiction. 28 U. S. C. § 1257 (2). Treating the papers whereon the

appeal was allowed as a petition for writ of certiorari as required by 28 U. S. C. § 2103, certiorari is denied. *Ellis G. Arnall* and *Cleburne E. Gregory, Jr.* for appellants. *D. Arthur Magaziner* for appellees. Reported below: 373 Pa. 105, 95 A. 2d 664.

BLEED. THROUGH POOR COPY